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Date: January 27, 2000
Case No.: 1998-LHC-2237
OWCP No.: 18-51769

In the Matter of:
MARK TREFRY,
Claimant

Vs.

SOUTHWEST MARINE, INC.
Employer[1]
and
LEGION INSURANCE COMPANY
Insurer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION BENEFITS
Party-In-Interest

Appearances:
For the Claimant:
Philip M. Cohen, APC
1550 Hotel Circle North Ste. 170
San Diego, CA 92108

For the Employer:
Daniel B. MacLeod
Andria L. Cartalano
1202 Kettner Blvd., Ste. 4400
San Diego, CA 92101

Before: **THOMAS F. PHALEN, JR.**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act as amended (33 U.S.C. §901, **et seq**.), herein referred to as the "Act." The hearing was held on December 9 & 10, 1998, in San Diego, California. All

[1]Southwest Marine, Inc. has been called, in various documents referred to herein, "Southwest Marine, Inc.," "Southwest Marine," "SMW," the "Employer," the "Respondent," and the "Defendant." The term utilized by the undersigned will primarily be the "Employer" or "Southwest Marine."

parties were given the opportunity to present evidence and oral arguments. Post-hearing briefs were requested herein, and the record was held open to permit the submission of certain exhibits which have been received and will be discussed further herein.[2]

Stipulations and Issues

The parties stipulate, and I find:

1. The Act (33 U.S.C. § 901, et seq.) applies to this proceeding.

2. There was an incident or exposure which gave rise to this claim on June 5, 1992, while Claimant was located at San Diego, California.

3. Claimant and the Employer were in an employee-employer relationship at the time of the incident.

4. The incident constituted an accident/injury, as to knee and finger, but is disputed as to his back.

5. The accident/injury resulted in a disability as to his knee and finger, but is disputed as to his back.

6. The accident/injury arose out of and in the scope of his employment as to his knee and finger, but is disputed as to his back.

7. The accident/injury became manifest to employee on June 5, 1992.

8. Employer was advised or learned of the accident/injury on June 5, 1992.

9. Timely notice of injury was given to the Employer.

10. Employer filed a first report of accident/injury on June 9, 1992.

11. Claimant filed a request for compensation on June 5, 1992.

12. Claimant filed timely notice of claim for compensation on June 5, 1992.[3]

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[2]Due to the unfortunate illness of Dr. Brown, delays were encountered in obtaining requested information from him. Dr. Schwab submitted a responsive report on August 6, 1999, and briefs were submitted in accordance with the adjusted schedule on August 6, 1999. (See discussion at pages 38-41, infra.)

[3]The actual date of the claim is June 16, 1992. (Ct. Ex. 2)

13. There was a timely notice of controversion filed.

14. The average weekly wage is $643.92.

15. The Employer voluntarily and without an award has paid temporary total disability benefits from June 5, 1992 to March 28, 1993 at an average weekly rate of $429.28 per week for 42 weeks, totaling $18,029.68[4], and he was provided medical benefits.

16. The last payment of benefits was made, stopped or suspended on March 28, 1993.

17. Employer filed a notice of suspension of compensation payments (Form 208) on April 1, 1993.

18. (A) Claimant has not returned to his regular employment with Employer since the date of the accident/ injury.

(B) Since the date of the accident/injury, Claimant has held the following job: Copy repair tech at salary "various" from November 23, 1993 until the present time (as of the date of the hearing.) (ALJ Ex. 1)

The unresolved issues in this proceeding are:

1. Nature and extent of injury.[5]

2. The application of Section 8(f) of the Act.[6] (T 38)

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[4]See, Jt. Ex. 1 and Er. Ex. CC & DD.

[5]Claimant: Whether Claimant injured his hip or back in the course of his employment; whether the Employer has demonstrated a labor market for the Claimant in light of his limitations, and whether Claimant has some disability with regard to his low back that precludes him from returning his usual, customary occupation at the Employer. Employer: Claimant had a knee and left ring finger trauma in accident of June 5, 1992, but no back injury. (T 37) Even if he did, Claimant's work as an electrical snapper, "was lighter than that of an ordinary marine electrician, that because of his technical skills, he was primarily assigned to work which, by it'a nature, is somewhat lighter, that assistance is always available for lifting of heavy items, and that the medical restrictions which ... have been imposed by the doctors, do not preclude him from returning to work as an electrical snapper." (T 230.)

[6]Claimant had a prior related injury in 1988 automobile accident which involved a crushed pelvis, damage to his sacroiliac nerve, broken ribs and a collapsed lung. (T 38)

For the reasons stated herein, the Court finds that the Employer had timely notice of the Claimant's symptoms of knee, left ring finger and back and hip injuries on or about June 5, 1992 and that he filed a timely claim for compensation. This court further finds that he suffers from a 5% permanent partial disability attributable to the condition, arising out of and suffered in, the course of his employment, and that the Employer is not only responsible for the benefits awarded herein, but is also entitled to Section 8(f) relief in mitigation of that obligation.

Summary of the Case

The Claimant, Mark Trefry, was born on March 25, 1952. (Er. Ex. X) He had a 12th grade education. He started working at the Southwest Marine Shipyard ("Employer," herein) in 1988 as a marine electrician, after service in the Navy, and was employed until the June 5, 1992 injury complained of in this case. He was actually terminated in December, 1992, after not returning to work from his June 5, 1992 injury. (Tr.217) He is now age 47.

The Employer is a maritime facility adjacent to the navigable waters of the San Diego Bay, where the Employer builds, repairs, and overhauls ships. Claimant was employed, and has continuously worked, as a marine electrician and electrical snapper, involving consistent, repeated motion of his fingers, hands, arms, neck, back knees and legs, lifting or pulling, according to his testimony set forth below, 100 lbs. occasionally, and 25 - 50 lbs. continuously throughout the time of his employment there, as set forth herein. He carried his 60 - 65 lb. tool box constantly; lifted 20 lb. intercom boxes, which were often joined together for 40 or 60 lb. units, and pulled 3/4 to 2 inch cable frequently, occasionally having to exert up to 100 lbs. to do so. (T 221 - 229)

On June 5, 1992, Claimant was injured when his left foot slipped while descending a ladder, onto a vessel. He fell 3 ½ feet to the deck, twisting as he fell, and stretched out his left hand to break the fall. In doing so, he dislocated his ring finger, his left knee and his hip and back. (T 239 - 241)

Injuries to the hip and back are disputed, and are the subject of the subject claim for benefits.

Findings of Fact

Documentary Evidence:

Exhibits: See Appendix A.

Testimony:

Testimony of Claimant, Mark Trefry:

On March 26, 1988, Claimant had an non-work related automobile accident in which he fractured his pelvis (fracture of the left sacrum through the sacrum foramen; fracture of the neural arch of the right side of the sacrum; dislocation of the pubic symphysis; rotational malalignment and deformity of the left hemipelvis; damage of the lumbosacral nerve roots on the left side secondary to fracture dislocation of the pelvis with reduction of the sacral fracture. (Report by Dr. Ham - Er. Ex. M p. 040) He also broke three or four ribs, and suffered a collapsed lung (pneumothorax and multiple trauma. (*Ibid*.; T 218) CT Scans of his L3 through his L4-L5 area were normal for disc protrusion, with the above fractures shown starting at the S1 level of the left sacrum. (Er. Ex. P, p. 049)

After his recovery, he entered a program for alcohol consumption, quit alcohol, cigarettes and caffeine, entered an AA program, paid all of his fines, and "built his self esteem." He successfully completed the program after a year, and then took a three day, physically demanding, hiking trip with an Outward Bound program; backpacking with fifty pound backpack, climbing and mountain repelling, as part of the program. (T 219)

Claimant then returned to work in September, 1988 starting at Southwest Marine as a marine electrician. He was upgraded to an electrical snapper in 1990. (T 220) During the last year before his injury on June 5, 1992, it was his opinion that the job description offered into evidence by Dr. Metcalf was a more accurate description of his job than that of Dr. Remas. (T 221; Er. Ex. Y, discussed infra) In this regard, he pulled cable sizes 3/8th inch to 2 inches, for, at times, four to six hours at a time, with force pulling at the rate of 25 - 50 lbs., depending on the friction of the pull when pulling against other cable, around ninety degree turns, where the friction could go to as much as 100 lbs. (T 222-223)

He testified that the heaviest thing that he had to lift was his Craftsman tool box, at 60 to 65 lbs., so that he could go to any part of the ship without returning to the tool crib, except for major or bigger tools. (T 224) It was also contrary to Cindy Spell, who carried 26 lbs. of tools in hers. (T 223) He testified that he was not aware of a weight carrying policy, but was aware that there were employees and mechanical devices available to help lift weights. (T 226) At times, he would often move his toolbox on wheels, but at other times he had to carry it up straight ladders, sometimes two levels of ladders at a time. At still other times, he would have to carry several different sizes of intercom boxes and transformer banks, with as many as three, 20 lb. transformers attached to each other, up the ladders. (T 227-228) He would have to attach these six feet off the floor, on the bulkhead. He also

lifted and carried 20 lb. motors. (T 229)[7] Mr. Trefry testified that he performed the job the way he determined to perform it, to keep himself employed at that level. (T 236)

On June 5, 1992, the day of his injury, Claimant was walking across the "brow" (bridge) on the starboard side of the ship they were working on, carrying a couple of angle pieces (one by one inch pieces of aluminum, one ten feet, one six feet long, to knock out a cable way with the welder, and get a cable installed where it belonged. (T 236-237) He had ascended a ladder to the bridge, and was getting ready to descend a second set of ladders to the ship. When he started to descend the ladder from the bridge to the ship, he intended to drop both angles down on the right hand side, leaving them against the rail, and stepped with his left foot to the first rung. Just as his heel went on the rung, he shifted his right hand - still holding the angles - to descend with his right foot, when his left foot slipped through the ladder rungs, and he, "went spinning – twisting and spinning" to his left, falling distance of about 3 ½ feet straight down." He put his hand out to break the fall, and hit the deck "real hard" with his knee down to his foot tangled in the ladder. His entire body twisted to the left. (T 239) He felt intense pain in his left hand and knee, dislocating his ring finger, and feeling the knee pain where it had been caught in the ladder. (T 240) He then "rolled out of the ladder" and another electrician helped him to first aid in the Medical Center. He did not return to work. (T 240-241)

He was then taken to see Dr. Schwab, at the Southwest Marine Medical Center, who examined his knee and left ring finger. The doctor straightened out the left ring finger dislocation, put a leg brace on his left knee, and gave him a prescription for Naprosin. (T 241) He was not satisfied with Dr. Schwab's treatment, in particular the way he put on the knee brace, and went to see attorney Phillip Cohen. (T 241-242)

Claimant's Exhibit 6 is a questionnaire filled out at the law offices of Attorney Cohen by the Claimant on June 9, 1992. (Ct. Ex. 6, pp. 107-108[8]) The writing appears in two colors, blue and red, the blue of which was all written by him at the time of filling-out the form, except for the P.O. Box on line 4, p. 107 (T 245). The red ink notations were by someone else. (T 246) The form was filled out by Claimant before he met with Mr. Cohen. (Note: In the additional comments, symptoms or complaints section, at the end of the

[7]The Employer's counsel conceded that there was no contest to Claimant's having performed these tasks, but contended that they were not essential to the job of electrical snapper.

[8]Claimant's Exhibits 1 - 40 were also marked with a page stamp, starting with page 1 in Exhibit 1, and ending with page 177 in Exhibit 40.

questionnaire, Claimant states: "I feel some pain in my left hip, some pain in my lower back." (Ct . Ex. 6, p. 108)[9])

At Mr. Cohen's office, he made arrangements to see Dr. Dickenson on July 13, 1992. (T 248) He did not want to wait that long to see Dr. Dickenson, but was required to treat with the Employer's physician 30 days before treating with another doctor, during which time he did continue his treatments with Dr. Schwab. (T 249) The questionnaire indicated pain in Claimant's low back, which he confirmed in his testimony as having been there on the day following the accident. (T 250) He then testified that, on June 10th, when he saw Dr. Schwab again, he explained the pain in his left knee, and when he asked about his ring finger, that seemed to be ok. Claimant then proceeded to tell Dr. Schwab about his back. However, Dr. Schwab, "just touched" his buttocks in a couple different places, and ignored" him. (T 251) Claimant stated that he attempted to show the doctor where the pain was, but he would just say that, "you don't appear to be tender" in certain places, which was not where the pain was. (T 251)

Claimant testified that, in fact, he did not have confidence in Dr. Schwab. Dr. Schwab told him that if he did not have confidence in him as a physician, they would both be best served by going somewhere else. (T 252) The Claimant, never indicated to the doctor that he wanted to stay under the doctor's care. (T 252) Dr. Schwab did refer him to physical therapy at Champion Physical Therapy, where Dr. Schwab's wife worked as a physical therapist. He went to Champion, but was not satisfied with it. He attempted to explain what was wrong, but Mrs. Schwab's attitude was that Dr. Schwab had prescribed certain physical therapy, which was all that she would do. (T 252) He testified that she put him on a machine and that when he came off the machine, he was, "in so much pain it was unbelievable." She stated, "we got the wrong settings on here." (T 252-253) He testified that he attempted to tell Dr. Schwab's wife about his back pain, that she wouldn't listen. (T 253) After that, Dr. Schwab would just ignore him. After 30 days, the Claimant did not return to Dr. Schwab. (T 253) On questioning by the undersigned, Claimant stated that he was seen a total of four times by Dr. Schwab. Claimant testified that he discussed his back on the other occasions, when he saw him, but Dr. Schwab did not make a statement back to him about it. (T 254)

Regarding the initiation and continuation of his treatment with Dr. Dickenson, he testified that he described the same back conditions to him as he had to Dr. Schwab, who treated him

[9]This does not mean that the matter of back or hip pain was communicated to the Employer. However, over the objection of the Employer, the document is admitted into evidence for what it is worth. It is relevant, and represents Claimant's statement about his state of mind and physical condition as of June 9, 1992.

differently than Dr. Schwab. He lined Claimant up with good physical therapy for the lower back and knee, and was treated with more respect by him, “like he understood my needs.” He listened and examined the parts of his body that he complained of, and the physical therapy was excellent. (T 255-256) Dr. Dickenson ordered MRI’s of his knee and his lower back. He gave him an epidural block in his spine, and told him that it might help his lower back. In fact, it did not. (T 256-257) In terms of improvement, he did not deny that the finger was improved after Dr. Schwab pulled it, and that he otherwise had the greatest improvement on his knee. (T 257) The only complaints that he made to Dr. Dickenson about his knee was that he had pain once in awhile. (T 258)

His back, however, continued to have pain every day. He used to ride a bike, but had to limit it, then gave it up. (T 258) Before his injury at Southwest Marine, he also used to water-ski. He skied every weekend for ten months from May or June of 1991 to January, 1992, with Mark Taylor until he started sport fishing in the San Diego Bays together with his brother, Dave, and two friends. (T 259-260) After his injury, when he had healed, he tried sport fishing once, in March April or May, 1993, and could not take the movement of the boat in his lower back. He never went again. (T 261)

Prior to the injury, he was an “avid bowler.” After that he did not think he could slide on his left leg, so he got rid of his bowling balls. (T 262) He also did bungee jumping on August 10, 1991, and evidently has not done it since then. He also reviewed other things that he did before, such as hiking and camping that he has not done since. (T 263)

Claimant testified that Dr. Dickenson told him to take vocational rehabilitation and pick out another line of work. (T 265) Claimant agreed, realizing that duties that he had performed at Southwest Marine such as pulling cable such as heliac, which is similar to a gigantic cable off from the TV set, requiring an awful lot of strength to pill, he “could not pull that cable now.” (T 266-167) Claimant described his final job at Southwest as a marine electrician with a few more duties and a raise, with the title of electrical snapper. (T 267) He considered the job of pulling cable on a day-to-day basis, to be part of his electrical snapper duties. (T 267)

Duties that he could not perform if he went back to work at Southwest Marine as an electrical snapper were summarized by the Claimant as getting around the ship, climbing up and down vertical ladders (no stairs) over eight or ten decks, covering the whole ship, especially if he had blueprints, which he usually covered as an electrical snapper. (T 269-270) When he would be following the prints, if he found a cable was missing, he would not have time to lay it all out for someone, so he would install it himself. (T 270) He would also have difficulty doing any type of a major hook-up,

such as radar, sonar, radio, and electrical fields, besides the IC field. (T 276) In major hook-ups, he could not get into the position necessary to do the work. *i.e.*, in gun turrets, where he would have to build scaffolding, and lay on his back and work "straight up" for five, ten hour, days. (T 277) He would also supervise both journeymen and apprentices doing that work. (T 278) In short, he testified that his job required that he do the work himself. (Ibid.)

Claimant's job also involved sitting, which he cannot now do for prolonged periods of time, especially on hard surfaces. His work required sitting "for long periods of time on hard steel;" at times as long as eight hours, for as long as a week. (T 279) In response to my question concerning his ability to do all of the positions of kneeling, crawling, sitting or squatting, he stated that he could not do that for hours. If he kneels, he kneels on his right leg only, and squats on his left foot only. He does not crawl, because he cannot put pressure on his left leg. (T 280) He described others that he could not do because of his back, such as laying down to work on eight by forty four boxes, lifting his tool box, and carrying com boxes up to forty lbs. (T 281-283)

There would be several crews operating on different shifts. John Pickett had a large crew. Cindy Spell had a smaller one. Mark Taylor and/ or some one else, had another. There possibly, was one more. (T 271) At that time, there were ten or so journeymen, electricians, and a "whole bunch" of apprentices. Near the end of his employment, he had four or five apprentices, and no journeymen. (T 271-272) He did all of the paperwork of a snapper, rather than a foreman or a lead man, but he was leading and teaching people. Pickett was in charge, but would leave, and Trefry would take over. He had to know everything about a contract, go by the specifications, and order floaters and cables. He would decipher the technical language for the electricians, and "make it easy" for them to read, assigning new working numbers to what appeared on the prints, and make multiple copies for the crew. (T 273-274) He would order everything that they needed, and keep track of the apprentices. In response to a question from the undersigned as to what would be cut out from his duties if he was told to cut out the electrician snapper duties, the only thing that would be cut out was the pay. He testified that there would be no less paperwork duties. (T 274-275) He testified that they made him a snapper in December 1991 because he knew the IC (intercom) world so well; that no one else knew it like he did, and that no one came and told him that certain things were his duties as electrical snapper. (T 275-276)

He started drinking some alcohol on a social basis in around May or June, 1991, at the rate of a maximum of six drinks a week, with two on one day, at a maximum. (T 283-284) Southwest Marine had a zero tolerance for alcohol either on the job, or just prior to it. (T 284) No one ever reported him. (T 285) About six months after

his accident, Claimant started drinking more due to depression. He was losing a lot of money, and was considering bankruptcy. He couldn't do a lot of things, such as sports, and couldn't really do anything: sport fishing, skiing, biking, or even returning to Southwest Marine to work. (T 285-286)

Through the Department of Labor, he went to see Carole Nimitz, after being released by Dr. Dickenson. She assisted him on exploring job alternatives, and with his drinking. (T 288) He limited his drinking, and decided to get into the copier repair service industry, through a training program. Upon completion, he looked for the best job he could find, an entry level position at Copyline Corporation, from which he went to Digitec Business Systems. (T 289-290) He now earns $1,550.00 per month. (T 291) From the packet he was given, he believed that to be the standard with his work experience. (T 291) Pay depends on the type of copiers that you know how to service, not the years in the business. Size of copiers makes a difference, and digital copier repair pays more than analog. Networking pays even more. He works with level three copiers, of six levels, which are analog. (T 293)

It is the employer's contention that the Claimant should be earning more, to $15.00 per hour, or $30,000.00 annually, which would be more than he was earning, thus eliminating a wage loss. (T 295-296) This will also be discussed below.

Claimant's Exhibit 40, part of Claimant's log, which was the subject of a timeliness objection by the employer, shows some of Claimant's duties. It is the Claimant's position that he did not know that the Employer was going to contest his duties until he saw the Employer's pre-trial brief, (T 297-298) and the attached documents, including the report of Dr. Remas with his job analysis, first seen on November 9, 1998. (T 298).[10] **[In addition, as evidence of past memory recorded, the document is relevant and Claimant would be allowed to refer to such a document while testifying at the hearing, as an exception to the hearsay rule, in any court. Based upon this fact, the fact of its relevancy, and the fact that I can see nothing in the record that would indicate that the Claimant's job duties would be an issue in the case prior to the submission of the pre-hearing statements, I am admitting it into evidence.]**

Claimant's Exhibit 25, the photocopies of check stubs from various employers with his record of earnings, were offered into evidence without objection, except for the Employer's belief that they were incomplete. They were accepted at the hearing with that limitation. (T 300) The checks are through July of 1997, but do not

[10]Also, after considering the evidence, in particular, the reports of Dr. Remas and Dr. Metcalf which are discussed *infra*, for the reasons stated in connection with the admission of Dr. Metcalf's report, Claimant's Exhibit 40 is admitted into evidence.

involve Digitec. They do show all of his earnings from the date of his injury through July, 1997. (T 301-302)

At the Employer's request, Claimant revisited Dr. Schwab, whose report issued on November 20, 1998. (T 303; Er. Ex. DD) Claimant testified that Dr. Schwab did not accurately record the statements that he made to him. The third line says: "He had worked at Southwest Marine for four years." Claimant testified that this was wrong. He did not work for four years. He worked from 1990 to 1992. (T 304) The report says he took Aleve. He takes Advil. Instead of "most days," he takes it every day. Under areas of pain, the doctor said leg, including calf, toes, foot and buttock. Claimant says that he told him it affected his left ankle, and stated that "his back complaints are unaffected by coughing or sneezing." (T 306) That is not true, according to Mr. Trefry. He told him that coughing and sneezing bothers him. (T 307)

On page three, Dr. Schwab stated: "I inquired as to whether his current back complaints preclude his participating in any activities, and he offered a very self contradictory history." (T 307) Dr. Schwab states that Claimant last water skied in December of 1990 or January of 1991. He states that he told Dr. Schwab that it was in January of 1992. (T 308) Dr. Schwab states that Claimant told him that his son has a 21 foot boat. Claimant does not have a son. (T 309) With regard to Dr. Remas' report that Claimant, "denies any other complaints involving any other anatomic areas," Complainant testified that he told him about the pain in his lower back, and in his legs that go from the back to another part of his leg (demonstrating.) With regard to his knee, as reported, he told him that, "it was fine and strong." However, he also told him that he gets pain in his knee every once in awhile. (T 311)

With regard to his 1988 injuries, regarding left leg pain and burning in his anterior thigh, he testified that he told him that these had completely resolved within about twelve months after the accident, but not that he could not tell him when. In about twelve to sixteen months after the accident, he was completely pain free. (T 312) Another inaccuracy in the report concerned the 1993 date of the Worker's Compensation claim, not 1992, as stated in the report. (T 314)

With regard to his present injury, Dr. Schwab states that he walks with a normal gait. Claimant testified that he does not, and has not done so for several years. (T 315) **[Dr Brown also characterized Claimant's gait as "normal." To the undersigned, the sub rosa videos show a slight "list" to the right when the Claimant is walking. I do not know how this would be characterized by the physicians, but I can see why the Claimant would think that his gait was not normal, at least on those days. Therefore, while I must give credence and weight to the medical opinions on the subject of his gait, the difference does not discredit or diminish Mr. Trefry's**

credibility on this or any other matter to which he has testified.] Dr. Schwab stated that he moved about in the examination room. He did, but, according to the Claimant, the Dr. was writing, and not looking at him. With regard to coughing not causing discomfort, Claimant states that he did not cough. With regard to calluses, Dr. Schwab points out "moderate calluses about the palms of both hands," from his examination, two weeks ago. Claimant demonstrated one callus on the right palm of his hand at the hearing, that could be seen by the undersigned. (T 315) **[I credit the Claimant on this statement about Dr. Schwab's observations about his calluses. The kind of working calluses being described by Dr. Schwab, would not have been gone in the two weeks between the examination and the hearing.]**

With regard to Dr. Schwab's sensory examination of both lower extremities revealing "sensation to light touch which is symmetrically distributed," Claimant told Dr. Schwab that the difference between the right and the left leg was that when he did the test to the left leg, he could feel it run all the way down his leg." (T 317) **[The problem is that I am unable to tell exactly what the doctor was examining, from a medical perspective. Claimant's statement, while true, may or may not have affected the doctor's test results. However, it is clear that Dr Schwab did not mention or comment on the Claimant's statement to him about it in his report. He does not clearly state what Claimant says are his symptoms, and then merges his opinion with an appearance of stated symptoms.]** (Er. Ex. DD)

When asked by the doctor if he could go further with his left leg, the Claimant said, "No," at which point the doctor pushed on it and recorded that reading. (T 318) With regard to hopping on one leg, "with equal facility on both lower extremities," Dr. Schwab noted complaints of discomfort at the left sacroiliac joint when he does so. There are no complaints of back pain." (Er. Ex. DD; T 318) **[This observation of the doctor is simply inconsistent with what was going on with the Claimant, on a continuing basis. A complaint of pain in the sacroiliac joint appears to be virtually the same as a complaint of lower back pain. At any rate, I credit the Claimant's testimony on it, over the report statement of Dr. Schwab.]**

The Claimant testified that Dr. Schwab's statement about complaints of back pain, "was not true." (T 318) He did not want to do a "hopping on one foot" leg test because he knew that it would be painful, and told that to the doctor. The doctor made him do it anyway, and barefooted on the tile floor, he hopped on his left leg. When he landed, he had, "severe pain right down my backside." He testified that, "I told him this and I told him I can't do this. He said he didn't care," and to, "do the other side," which he did not do. (T 319) He testified that he had the pain and told him so, and that when he hit, he screamed. He did not do the other side because

he couldn't get his balance; he had a sore back and it was "killing him." (T 319) **[I credit this testimony of the Claimant. It is consistent with his prior statements about his left leg.]**

Dr. Schwab stated that Claimant came into the examination, very angry. The Claimant denied that, stating that he had determined that he would be calm, no matter what the doctor wanted him to do. He testified that he did not have much respect for the doctor, so he kept track, without swearing, cussing, or demanding things from him. (T 320) **[Whether true or not, Claimant was at least upset, which might have presented as anger, but I am not sure what this had to do with the examination. Dr. Schwab's notation of it demonstrates that both had a bias about the other in this particular examination.]**

In addition, the report stated that no current radiographs were available. However, when he went into the radio room, he could see his file from 1992 and those taken in 1992 were in there. (T 320-321) **[Claimant's statement does not contradict the doctor's statement that there were no "current" radiographs in there.]**

Dr. Schwab had reviewed the videos of Claimant working, (Er. Ex. BB) Claimant brought to the hearing the equivalent of the boxes that he was shown in the video. One was for a drum that he uses in copiers, weighing about a pound. (T 322) The other was for a cam kit, the larger of the two, weighing 3 1/4 lbs., with the cam kit inside of the box. (*Ibid.*) He was also carrying a vacuum cleaner in the first video (Er. Ex. AA) which weighs 11 1/4 lb., and is used for cleaning copiers. (T 323) He testified that his leather case, filled with tools, weighs 12 ½ lbs. (*Ibid*.) Claimant testified that his back does bother him at the end of the day on his copier repair job, and the depiction of his "contralateral trunk lean" is a result of him carrying the tool case referred to above. (T 324) **[This is a decided affect on the Claimant's gait.]**

On cross examination, with reference to Dr. Schwab's characterization of his gait as "normal" and Claimant's differences with him on that, Claimant acknowledged that Dr. Dickenson, in his report of November 30, 1992 and Dr. Brown's in his similar characterization, both said his gait was "normal." (T 326-327) Claimant also acknowledged that in Dr. Brown's report in Employer's Exhibit V, that he stated that the Claimant had no permanent impairment and no work restrictions. (T 327)[11] Dr. Brown also

[11]Claimant's Counsel objects on the basis that this is part of a report with contrary conclusions, set forth in Claimant's Exhibit 18. I agree that the check marks in this summary report are contrary to the actual reports that it summarized and were in error. See discussion in Declaration of James D. Brown, M.D. (Ct. Ex. 42.)

characterized his "gait" at that point in 1995, as "normal." (T 329)[12] Dr. Brown did so again on September 16, 1996. (Ct. Ex. 21; T 330)

Claimant testified that the last time he was treated for his back problem was in 1992 or 1993 by Dr. Dickenson. (T 330)

Claimant again acknowledged that he first felt his back pain symptoms on the night of his accident. (T 335) Referring to his May 12, 1995 deposition, p. 69, he purportedly had responded to the same question: "I don't recall." (T 337) However, on objection by Claimant's counsel, there was a correction mailed to Mr. Taylor of that page, by letter dated May 5, 1996, in which the Claimant corrected the response to, "the next morning." (Ct. Ex. 43; T 338-339)[13] That document has been admitted into evidence.

With regard to Employer's Exhibit J, a report of Dr. Schwab, dated June 10, 1995, he notes, "He also complained of some pain about the left hip which he gets after he sits for a long period of time." Claimant responded, "that statement should have read lower back, not lower hip."[14]

On recall of Mr. Trefry after supervisor John Pickett's testimony, he testified that he recalled speaking to Pickett after the 1992 accident at Southwest Marine when he went there to pick up a small tool box; one of two with some expensive tools in it. Mr. Pickett asked him about his accident, and Claimant told him that he

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[12]The Employer did not return to the other documents referred to in Exhibit 18.

[13]The Employer's pages of Claimant's deposition were received as Employer's Exhibit FF. Both Employer's Exhibit FF, and Claimant's Exhibit 42 having been submitted, and are hereby received into evidence.

[14]At this point, I want to note that Dr. Schwab had also characterized Claimant's description of his symptoms as coming from the "sacroiliac joint" as a source of pain, - the area injured in 1988 - to which the Claimant objects, stating that he was referring to his lower back. I doubt that the Claimant told the doctor that he had pain emminating from his "sacroiliac joint." The term "sacroiliac joint" is defined in Taber's Cyclopedic Medical Dictionary as, "The articulation between the hipbone and the sacrum." (14th Ed., p. 1266) The sacrum and the lumbosacral spine are joined at S1-L5, at which point there is now a disc bulge or herniation that was not present in the 1988 CT scans, depending on whose description is credited between the opinions of Drs. Schwab and Brown. It is my opinion that the general description of "low back pain" by a non-medical person describing his own symptoms of pain in that general area, is not disingenuous with any of those characterizations. It is my opinion, and I credit the Claimant's testimony on this point, that he did tell Dr. Schwab that he had low back pain on this occasion, and probably on several other occasions, and that Dr. Schwab continuously characterized what he was being told as something else. It is also my opinion that in characterizing the Claimant's post-1992 injury symptoms as they were being described by the Claimant to him, Dr. Schwab was attempting to maintain a relationship of the 1992 injuries to the 1988 injuries, which he knew about from the employer records, but would not concede a localized injury to do so.

had to hire an attorney, and was advised by the attorney not to speak to anyone about then particulars of the case; that he did so, and that he did not tell him about his knee bothering him, or that it had spread to his back. (T 366) He also denied that he had told Pickett that he had been riding his bike on the boardwalk. He could not ride a bike within a few weeks of the accident. (T 366) **[This testimony, at best, stands in equipoise. It has been denied by the Claimant, and, without corroboration, cannot be held against the Claimant as an admission against his interest. It does not make sense, from a timing standpoint, and is, therefore, discredited.]**

Friend, Thomas Zeffiro:

Claimant's friend, Thomas Zeffiro, testified that he saw Claimant generally, every weekend between the time of Claimant's automobile accident in 1988 and his June 5, 1992 accident at Southwest Marine. They had participated in physical activities together, including fishing, camping, hiking and water skiing, and did not have complaints of pain. Occasionally there were rough swells and jarring of the boat when fishing, and he was able to jump over waves while skiing behind a speed boat in the San Diego Bay, without complaint. (T 43-46) After his 1992 injury, he has not been able to go camping, and has not water skied with him. They tried fishing in a bigger boat, but he was "uncomfortable" with it. After stating that his back bothered him, they had to cut the trip "a little short," (T 47-48) and they did not go fishing again. Also, he has not hiked or camped with him. (T 48) He was unable to lift the kinds of things that he could before the injury, such as coolers, etc. (T 49) After the first accident, they also bungee jumped, but have not done so since the 1992 accident. He has noticed a slight limp in the way that claimant walks since the 1992 accident. (T 50)

On cross examination, Mr. Ziffaro confirmed that he had never observed the Claimant working at Southwest Marine, and that he had not gone camping, bungee jumping or water skiing since Complainant's 1992 injury. He went fishing once. (T 50-51) He did state, however, that he has gone camping and fishing himself, and has done some off road motor cycling. (T 52)

Claimant's Brother, Roger Trefry:

The Claimant's brother, Roger, testified that he has seen Mark at least every other weekend since 1990. He knew that Mark had sustained injuries to his knee and hip, and his hand particularly; and that he was having some problems with his back. (T 55) Besides skiing and bowling, which he had done with Mark, who cannot do so any more, Mark has been unable to "rough-" house with his sons, especially the older one, without "extensive pain" afterwards.(T 55) He has seen a high increase in noticeable limping of the left leg,

and has heard him complain of pain at 2:00 in the morning when he couldn't sleep because of it. (T 57-58)[15]

On cross examination, Roger Trefry stated that he had heard Mark complain of pain in his leg and his back area, but could not remember the specific portion of them. (T 62) As with Mr. Ziffiro, he had never seen Claimant working at Southwest Marine. (T 63)

Co-Worker, Andrew K. Henneken:

Andrew K. Henneken testified that he had worked in the shipyards as an electrician for 35 or 40 years. (T 64-65) He had worked for Southwest Marine for two years in the 1991 - 1993 time period, and again in 1998. (T 66) He first worked with Mark Trefry in 1990 as a Marine electrician, and has known him since then. (T 67; CX 29, p. 116)[16] Mr. Henneken testified that Claimant was a talented electrician and a good trouble shooter, and that he knew his systems. (T 69) He observed Claimant moving heavy equipment such as controllers and motors weighing from a few to several hundred pounds, personally observing him lifting from 65 to 70 lbs. He saw him lifting motors, his tool bag and pulling cable for time periods ranging from a half day to two weeks. (T 70-74) He also observed him climbing tight stairways and working in awkward positions in cramped spaces, at times on a daily basis. (T 75) Some heavy equipment he had to handle while working on a ladder, and carrying or wearing his tool belt. (T 83-86) The longest time that he observed the Claimant working was for a solid week on the Viking Serenade on the ventilation control circuitry, in the same space as he was. (T 88-89)

On the second day of the hearing, Mr. Henneken continued his testimony in support of the distinction between a "marine electrician" and a "snapper." He testified that these are the two classifications of electricians at issue here, the "snapper" being the lower level of "marine electrician," which was the level that had been achieved by Mr. Trefry, and the second being the fully

[15]Recognizing that Administrative Law Judges may receive hearsay evidence, a simultaneous description of pain as it occurs, constitutes an exception to the hearsay rule, and may be given more weight by the judge. Such a description accompanied by an observation of favoritism to the particular body part, may be given even greater weight. (See, Rule 803, Fed. R. Ev. Re: existing mental, emotional or physical condition - as opposed to past memory.)

[16]The Employer objected to the statement and affidavit of Mr. Henneken offered into evidence as Claimant's Exhibit 29. (T 16) 29 C.F.R. § 18.803 (a) (29) governing written statements of lay witnesses as an exception to the hearsay rule, permits such statements made under oath or affirmation and subject to the penalty of perjury, provided the statement of the witness is made available to the opposing party and the declarant is available as a witness. Since Mr. Henneken stated (affirmed) under penalty of perjury that the statement was true and accurate, and he was present at the hearing, and was, in fact cross examined by the Employer, it's objection to Exhibit 29 is overruled, and the statement is admitted into evidence.

qualified or journeyman [my terms] “marine electrian,” with the former (“snapper’) being a “subset” of the first. (T 101) **[Claimant’s attorney explained that the snapper could only perform the lower level of physical work, but a higher level of technical work, because he is directing it, but that the marine electrician could perform all of it. (T 101)]**

Claimant would have to do bending, stooping, stretching, reaching, bending half-over-double, working underneath false flooring. Under the false floor is the main floor, twelve inches below it, where the cabling, piping and boxes and hardware were run. (T 102) He testified that the Claimant would perform some jobs that were not stressful, including trouble shooting systems, documentataion, testing, evaluatinons and training. (T 107) Clarifying the above, he testified that, “if your going to be a journeyman electrician on the waterfront, assigned to work on board a ship, or anyplace else, you’d better be physically fit enough to do the job.” (T 107) Mr. Trefry was required to do all of the jobs, and was straightforward and honest. (108)

With regard to an affidavit submitted into evidence by Foreman, Cindy Spell, (Er. Ex. AA) Mr. Henneken testified that she was not very truthful or honest, and that she would take reports submitted by others, change them and submit them to take credit for the work completed. (T 111) With regard to her own work she had some limited electrical knowledge, but he would have to go in and “straighten up systems that she’s supposed to have been in charge of repairing and have been in total disarray.” (T 113)

In Foreman Spell’s affidavit, she referred to the Claimant as having been taken off from the task of doing a list and being sent back to production. (T 115) Claimant testified that the “listing” portion of the job could not be separated from the production tasks. (T 115-116) The rest of Mr. Henneken’s testimony was a discussion of how much weight employees actually carried on the job, with an implication from the questioner on cross examination that it was 50 lbs., and the witness stating that they carried more than that daily in the tools that they carried to work. (T 123-124) The rest of Mr. Henneken’s testimony was taken in dealing with details of work such as when he worked with the Claimant, attendance at safety meetings, and equipment and personnel available to help lift heavy weights. (T 127- 129)

Co-worker, Mark Taylor:

Following the hearing, Claimant took the deposition of Mark Taylor, who testified that he was a friend of Mr. Trefry since 1989, owned a boat, and frequently went waterskiing with him, about fifteen to twenty times before his accident on June 5, 1992. (Ct. Ex. 43, pp. 1-6) They would water ski every weekend, for eight to ten hours, all day long, and that it would be very hard on your

back. He testified that Mr. Trefry never complained about his back before the accident, or a prior accident.(*Id*. @ 6-7) After the accident, he asked him to waterski, but said that he could not do so due to his accident. (*Id*. @ 7-8)[17] On cross examination he admitted that he did see him once on the beach, after the accident, wearing a knee brace, but that was after he had asked him to water ski, and he declined. (*Id*. @ 9-10) He noted that while he was a co-worker of Mr. Trefry's, he never actually worked together with him. (*Id*. @ 10)

Foreman, Cynthia Spell:

Foreman, Cynthia Spell, was called out of order to testify on behalf of the Employer. (T 136) Mark Trefry worked there when she was a Supervisor on the US STERETT, and supervised him "just briefly" during that time, although he worked for another supervisor, and they would, "often exchange employees," as needed. (T 137) Trefry worked as an electrical snapper for supervisor John Pickett. She testified that a marine electrician is an "all encompassing description," while a snapper is a "supervisory position," with a little more responsibility and a little less labor...."[18] She testified that he was given the snapper position because he was a skilled electrician, having been hired as a journeyman. They selected him as a group because he was willing to take on some extra responsibilities, and they needed some additional supervision. Upon their recommendation, he was appointed by the department head. (T 138-139)

Ms. Spell demonstrated the canvas tool satchel that she normally carried to work, which she testified weighed 21 lbs. She stated that it was typical of those carried by electricians on the job there. (T 141) These, she stated, included tools listed as necessary, plus a few wrenches that she preferred, in addition to those on the list. She testified that she also has a tool box which they are all required to keep chained to a chain in the gangbox. (T 142) She then stated her observations of Mr. Trefry, who would be carrying a similar canvas bag, with fewer trouble shooting tools, such as a meter, some screwdrivers and pliers. (T 144)

While working with the Claimant, Ms. Spell did not recall him complaining of headaches or taking medications. (T 144) Admitted into evidence was Ms. Spell's affidavit. In it she stated that she came to regard Mr. Trefry, "as a hypochondriac and an inordinately heavy drinker. ... always complaining of something, usually a headache or a backache." He often took medication, which he told

[17]Questions about alcohol or medications are outside of the scope of the deposition agreement, and objections thereto are sustained.

[18]This was the exact opposite of what I had expected the testimony to be concerning these job duties, to that point in the hearing. I thought that Mr. Henneken's "marine electrician" position was at a higher level than the "snapper" position, since no witness had identified the latter as a supervisory position.

her was for a sinus condition.[19] (Er. Ex. AA pp.99-100) However, Ms. Spell confirmed on cross examination that while he was on the job at Southwest Marine, she never reported any of Mr. Trefry's problems, deficits or performance on the job that she had mentioned. (T 151)[20]

Ms. Spell insisted that job rules required mechanical devices for lifting items over 50 lbs. (T 145) However, she confirmed that the lifting restriction does not say that the employee may not lift over 50 lbs., only that she as a supervisor may not direct someone to lift over 50 lbs. (T 146)

[I found Ms. Spell's testimony to be curious, at best, and of limited value. It was curious in that she had admittedly, only limited supervisory authority over Mr. Trefry and limited working contact with him. She emphasized the weight of her own tool bag in comparison with Mr. Trefry's, with nothing to offer as to what he actually did in terms of what he carried or work that he performed. She admitted that she had other tools in the gang box, and that there were no restrictions on carrying items above 50 lbs., while admitting that she could not direct persons not to carry more. Her comments about Mr. Trefry's alleged drinking were defamatory, with no credible follow-up. In other words she had a transparent bias against him, with little relevant testimony. I give her testimony less weight than I give to the Claimant on all of these points.]

Foreman, John Pickett:

Mr. Trefry's immediate supervisor at the time of his alleged injuries was John Pickett, who testified that he was employed by Southwest Marine as an electrical foreman for eleven years. (T 344) At the time of Claimant's injuries in 1992, he was foreman aboard the USS STERRETT, where Claimant worked for him. (T 345). He made Claimant's job assignments, which at that time was to interior communications equipment installation, as an electrical snapper. The snapper is a working supervisor, the first level of supervision. It is below a leadman, and slightly above a journeyman. (T 345). As such, he was responsible for supervising the installation of equipment, testing, and inspecting the work of journeymen and helpers. (T 346) He assigned Mr. Trefry to that area because he had a lot of skill in IC systems, which were not typical of a marine electrician, but more technical: reading and interpreting blueprints, laying out where and how equipment should be installed,

[19]The rest of the affidavit contained too much hearsay to be useful or credible, with insufficient questioning to be used as evidence.

[20]It is my conclusion that Ms. Spell's testimony had virtually nothing to do with any of the questions at issue in this case, and that it would have served the parties better had she not testified at all. This is not an unlawful discharge or discipline case, nor did it concern an issue of whether he had contributed to his condition.

etc., and the actual hookup of the equipment; generally directing people, rather than doing the more physical part of the job. It was a less physically demanding part of the job. (T 346-347) While employees are not disciplined for refusing to lift weight, at that time, Mr. Trefry was not required to lift "extremely heavy weights," in response to a question of whether he was required to lift "heavy weights." (T 347) He would be required to lift 35 to 40 lb. Equipment they were installing. (T 348)

Following Claimant's June 5, 1992 injury, he talked to him at the gate, where Claimant was on crutches, and another time by phone. When asked about his knee at the gate, some ten days to two or three weeks after the incident, he told Pickett that his knee was not doing very well and that it had spread to his back. (T 350) In the phone conversation, Pickett stated that Trefry told him that he had been riding his bike on the boardwalk and going to a bar that was down there. (T 350-351)

Claimant was not ordinarily assigned to pulling cables as a snapper. They have cable pullers, helpers and improvers, at a lesser pay grade who are normally assigned to do so. (T 351)

Electricians are permitted to select their own tool box there, and to select their own tools, including the quantity to be carried. (T 352)

On cross-examination, Mr. Pickett testified that while Mr. Trefry was not required or directed to pull cable, he was directed to get certain jobs done, and might have been supervising people who pulled cable. (T 351-352) He was not supervising the Claimant when he pulled cable on the VIKING SERENADE, and was not always supervising him, and could have been doing so all day. (T 352-353) Mr. Pickett supervised Claimant for three months on the STERRETT, but was not physically with him when Claimant was working. He never told him not to pull cable. (T 355-356)

Mr. Pickett confirmed that at Southwest Marine, Claimant was considered a highly skilled and knowledgeable marine electrician, who performed his job in a very efficient and quality manner; and that at times when work slowed down, lay-offs would be determined by skill, amount of production, attendance and other factors. (T 357) He testified that, "normally the guys don't carry their full tool boxes around the ship...." and "have gang boxes..." from which they, "pick out what tools they need for that day. " (T 358) He also testified, however, that he never saw what Mr. Trefry did. (T 359)

Mr. Trefry never complained to him about his back, and had no reason to question his honesty or integrity when he supervised him. (T 360) Mr. Pickett never observed Claimant drinking alcohol. He has smelled it on him, though. (T 361) When asked about not reporting it, he said, "That was a mistake on my part," because he did not know when he had been drinking. (T 361-362)

In addition items covered above, in an affidavit presented by the Employer, (Er. Ex. Z) Mr. Pickett stated that Claimant told him in a phone conversation a couple of weeks after the accident he was riding his bike on the beach, having a good time and going to the Red Onion, and that he sounded like he was "under the influence." **[As stated above, this conversation is denied by the Claimant, and is not corroborated. Therefore, it has not been established as a statement against his interest by a preponderance of the evidence.]**

In his affidavit, Mr. Pickett stated that at the time, the Claimant was working with changes to the ship's intercoms, which weighed 25 to 30 lbs. (Er. Ex. Z, p. 098) He also testified that his typical work did not involve pulling cables. [**This testimony does not unequivocally contradict Claimant's statement that at times he was working with 20 lb. boxes that were attached to each other, which would then weigh 40 or 60 lbs. Depending on the number, or that he actually pulled cable that required more force and exertion due to the conditions of pulling around other cable and corners. Since Mr. Pickett was admittedly not with Claimant when he performed his work, he could not, and did not testify to what he observed Claimant doing. Therefore, Claimant's testimony on these points remains uncontradicted, and is given more weight than that of Mr. Pickett. In addition, Mr. Pickett's citing of Claimant's misidentification of the ship they were working on at the time of his 1992 injury, (USS HEWETT versus the USS HERRETT)is an obvious mistake rather than a lie intended to affect his testimony, and is not deemed sufficient to affect his otherwise credible testimony.]**

Vocational Expert, Dr. Robert Dane Metcalf:

Vocational Expert, Dr. Robert Dane Metcalf, testified on behalf of the Claimant that he completed a job analysis relative to Claimant's prior work at Southwest Marine. He also provided a written job analysis report which is admitted into evidence. (Ct. Ex. 38) (See following objections to Dr. Metcalf's report: overruled.) Included in his review was a job analysis completed by the Remas Group of August 11, 1998, and an interview with Mr. Trefry, who also provided him with a log of information on his job duties. Dr. Metcalf also reviewed Mr. Henneken's affidavit commenting on those job duties, (Ct. Ex. 29, p. 118; T 157) and the Dictionary of Occupational Titles (DOT), a DOL publication. (T 158)

Dr. Metcalf concluded that when considering Mr. Trefry's job as snapper, the job included electrician work, interior communication work and hook-up specialist.[21] Claimant also pulled cable. The DOT title for interior communication work that he did (a certification that Mr. Trefry holds) is classified as a "communications

[21]This was contrary to the Remas Group which only included one of three job titles covered in the Dictionary of Occupational Titles. (Er. Ex. Y)

electrician supervisor," under DOT 823.131-010, which is "heavy skilled work." (T 159) "Cable puller," is classified under DOT 829.684-108 as, "heavy semi-skilled work." "Heavy," is lifting up to 100 lbs. Occasionally, and up to 50 lbs. frequently, which corresponds to his description of his work. (T 160)

On cross examination, Dr. Metcalf confirmed that he was engaged to perform the analysis in November, 1998, and issued his report on December 3, 1998, just six days before the start of the hearing. (T 161)

Objections to Dr. Metcalf's Report: Overruled

On motion that the report of Dr. Metcalf be stricken, Claimant countered that the report was secured in response to information submitted by defense counsel on November 9, 1998, in a report dated August 11, 1998 from the Remas Group (Er. Ex. Y), There was no prior notice to the Claimant that there would be such an expert witness or evidence. (T 162-163) The Employer argued that it had met the 30 day rule of Judge Smith in its listing of Dr. Remas as an expert witness and the simultaneous submission of its report to the Claimant on November 9th.

In resolving this matter, it should be noted that the administrative law judge has broad discretion in admitting relevant evidence into testimony, and striking the balance in favor of the admission of such evidence. See, Ion v. Duluth, Missabe and Iron Range Ry. Co., 31 BRBS 75 (1998) and 32 BRBS 268 (1998). (Two decisions.) The Board has also ruled that it is within the Administrative Law Judge's discretion to exclude evidence offered in violation of a pre-hearing order. Williams v. Marine Terminals Corp., 14 BRBS 720, 732-733 (1981). Since this is viewed as an administrative discretionary matter, it is also within the Administrative Law Judge's discretion to admit such evidence.

In the initial May 11, 1998 pre-hearing statement, Form LS-18, of the Claimant, and that of May 30, 1998 of the Employer, neither listed expert witnesses. The Employer did list a "Mark Remas" as a general witness. It did not state that he was an expert witness, or that there would be a vocational expert opinion report from him. (ALJ Exs. 8 a & b, and 10) It then appears that Mr. Remas prepared a job description report for the Employer on August 11, 1998, and that he mailed it to the Employer's counsel on September 3, 1998. (RX Y)

On November 9, 1998, Claimant submitted his pre-trial statement and exhibit and witness list. For the first time, it lists Dr. Metcalf as a potential witness to testify how, "Claimant's post injury earnings represent his post injury earning capacity," (ALJ Ex. 10 p. 9) and also lists his report as a Claimant Exhibit Y. At

the hearing, the Employer objected to further testimony and to the responsive report of Dr. Metcalf based on timeliness grounds. (Supra)

Judge Smith's notice required documents to be disclosed for the hearing 30 days before the trial, but did not set forth all of the obligations of the parties to give timely notice of expert witness reports. The question is whether the Respondent had an independent obligation to submit the August 11, 1998 vocational report of Dr. Remas to the Claimant in a more timely manner to permit the Claimant time to object or to meet the report's conclusions, and still comply with Judge Smith's 30 day order.

29 C.F.R. § 18.803(a)(28) permits such reports of an expert witness with a view toward litigation, "provided that a copy of the report has been filed and served upon the adverse party sufficiently in advance of the hearing to provide the adverse party with an opportunity to prepare to object or meet it." It also requires specific information on the identity of the expert and the nature of his opinion, along with a statement of his or her credentials. In addition, Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure, requires the disclosure of both the "identity" of any such person to be used at trial, and that, in the absence of stipulation or other court direction, the expert witness disclosures be made, "at least 90 days before the trial date." Read closely, except for the specific time provisions of the Federal Rules, Section 18.803(a)(28) closely follows the requirement of Rule 26(a)(2)(B).

The Employer did not submit the report to the Claimant at any time prior to the one submitted in relation to the 30 day requirement for general documents under Judge Smith's rules.

The notification process set forth in the rules is instructional, if not binding. Simply stated, there should be no surprises in this regard. Parties are required under those rules to provide adequate notice of expert opinion and testimony, in time to have "a fair opportunity to object or meet it." That was not done. I am admitting the report.

It is also noted that both parties were remiss in their expert witness notice, including obligations. Both should have disclosed their intentions with regard to the use of Dr. Metcalf and Dr. Remas as vocational expert witnesses. Carried to its extreme, I would be within my right to exclude the testimony and the reports of both of them. However, both did disclose their intent to utilize them as witnesses in their pre-trial statements, and the testimony and reports of both were important to the decision in this case. However, the Employer's holding of the August 11, 1998 report until November for a December hearing violated both the letter and the spirit of the rules. Short of excluding both witnesses and their reports on 29 C.F.R. § 18.803(a)(28) and/or Rule 26(a)(2)(B) grounds, the equitable conclusion is to admit them both. Therefore,

the Employer's objection to the admission of Dr. Metcalf's report based upon its timeliness is overruled, and the testimony of both vocational experts and their reports will be duly considered herein. This includes responses to information included within that report for the first time, such as Respondent's Exhibit 25, discussed above.

There is an additional objection to the report of Dr. Metcalf based upon incompleteness and reliance, "upon facts not in evidence, specifically Exhibits 29 and 40." (Er's Post-Tr. Brief, n. 9) Claimant's Exhibit 29, the statement and affidavit of Andrew Henniken, was the subject of an objection based on hearsay, (T 16) and timeliness of disclosure. (T 21) Based upon my ruling set forth in Appendix A, the objection was overruled, and the statement admitted. The Administrative Law Judge has broad discretion in the admission of relevant evidence, which both reports are. In addition, hearsay evidence is generally considered admissible, if reliable. See, Richardson v. Perales, 402 U.S. 389 (1971). Furthermore, in administrative hearings hearsay evidence may constitute substantial evidence to support a finding, where it possesses rational probative force. Camarillo v. National Steel& Shipbuilding Co., 10 BRBS 54, 60 (1979). Here, the statement was probative of issues regarding Mr. Trefrey's job duties and Mr. Henniken did testify at the hearing, allowing opportunity to cross-examine on the statement as well as testimony. It was therefore, admissible. In addition, to the extent that any particular portion of Dr. Metcalf's report was based solely upon the statement, the Employer has failed to identify any such portion of the report that is related to Mr. Henniken's statement in the Dr. Metcalf report, so the objections thereto are also overruled, and it is admitted into evidence.

Insofar as the relationship of the admissibility of the log reports of the Claimant in his Exhibit 40 is concerned, the Employer has, likewise, failed to specifically identify any portions of the Dr. Metcalf report that may have been affected by the admission of that exhibit. Furthermore, the Claimant's log book entries constitute a daily statement of his then existing state of his physical condition to perform the work listed, and may be admitted into evidence based upon the 29 C.F.R. 18.803(a)(3) hearsay exception, insofar as it recites the duties that he was physically able to perform at that time. Therefore, the objection to the admission of Claimant's Exhibit 40 is overruled.

Vocational Expert Tracy Mark Remas Report:

Tracy Mark Remas is a vocational rehabilitation counselor, prepares job analyses, doing market labor surveys, analyzes jobs and evaluates people with injuries and assisting in their return to employment. He prepared the Remas Report, referred to in its admission, as Employer's Exhibit Y, and has considered the Metcalf Report for his testimony. (T 180-181) He met with Supervisor John

Pickett and Foreman Cindy Spell on August 4, 1998 to obtain a description of Claimant's work as an electrical snapper. He also went into the warehouse to see how materials are bundled and prepared, and had a scale to weigh different items that would be used by a snapper. He also went on board a vessel with Mr. Pickett and walked from the electrical shop to the dock and on board the vessel, and from the entry way through the command center to see the areas where the snapper would perform duties. He also observed work activity, blueprints used, and tools and materials handled, resulting in Exhibit Y. (T 181-182) **[N.B. He did not mention observing an electrical snapper working, and certainly did not observe Claimant working. I overruled an objection on the latter, stating that I would consider the connection, if any, that has been made.]**

Mr. Remas characterized the electrical snapper work as that of a more senior electrician; a working foreman, whose responsibility it is to install and hook-up more sophisticated equipment. (T 183) As stated in his report, he testified that they are required to read blueprints or schematics at a higher level to select wires and engage (Connect) the wires and run them to different control boxes, as well as plot the paths of cables. He was reviewing intercom systems, with 17 lb. units placed on brackets. The snapper plots out the work, obtains the materials, installs and tests them. (T 183) **[Note: this is just one of the jobs described by Claimant that he performed as a snapper.]**

Mr. Remas reviewed medical reports of Drs. Schwab and Brown, and based on their restrictions, it was his opinion that Claimant could perform the work of electrical snapper." (T 183)

With reference to the May 10, 1993 report of Vocational rehabilitation specialist, Carole Nimietz, (Er. Ex. EE,) he testified with regard to, "salary was discussed at three years of being $15.00 per hour," he testified that was a reasonable salary projection for a copier repairman in San Diego. (T 185) **[N.B. I overruled an objection to this testimony based on foundation, stating that it has to be applied to the Claimant or would not be given much weight.] (T 183)]** He further testified that the range in 1993 would have been $12.00 to $15.00 per hour as a medium, with jobs paying as high as $17.00 per hour. Now (in 1998) the range for copier repairman with 3 - 5 years experience would be about the same. (T 188) From his sources, he testified that the $1,550.00 being paid to the Claimant for copier repair service, with five years of experience in metropolitan San Diego, is not competitive, and is more of an entry level wage. (T 189) For this he called a training facility, claiming $1,300.00 a month to $2,000.00 per month just out of training. His research calling employers found it to be higher. (T 190)

Mr. Remas confirmed that when he routinely does job analyses, he obtains or attempts to obtain, information about actual duties from the injured worker, and in this case he did not do so, and in fact he was directed not to do so. (T 193-194) In addition, while he went to the ship to see what cable had to be pulled, he did not pull it to see what exertion would be required to do so, even though he knew that Claimant pulled cable on the job. (T 196) He admitted that he was not familiar with twisted telephone cable sometimes pulled by the Claimant. (T 198) He also admitted that when he reviewed materials to be used in work on the ship, he did not consider those that would be used by an interior communications hook up specialist, and that he did not know the name or the class of the ship he viewed. (T 200)

Mr. Remas also confirmed that he never saw the reports of Dr. Dickenson, but did see the prolonged sitting restrictions of Dr. Brown. (T 201-203) He assumed that Mr. Trefry could alter his position as needed, from these reports, and it was not his understanding that Mr. Trefry would have to sit for eight to twelve hours without altering his position. (T 204-205) He did state that if Dr. Brown stated that the Claimant could not climb, that would restrict his job, as would restrictions on heavy lifting, defined as lifting over 100 lbs. occasionally, and fifty to one hundred lbs frequently. (T 207)

In reviewing companies surveyed about copier repair service employees, Mr. Remas stated that he had talked to representatives of Business Unlimited, Icon, Infinity Copiers, Coast Graphics and Imagecom. (T 209) He was referring to various companies that he had listed on notes that he had compiled, which were shown to Claimant’s counsel on request, with my approval. Imagecom was paying $6.50 to $6.75 to start, and after two years, $9.75 an hour. (T 210) Infinity Copiers was the same, but a relative of the person interviewed there received $13.00 an hour who just had an electronic background, and three years experience. (T 211) He did not confirm whether anyone other than that relative had been hired at any of those companies within the past five years. (T 212)

On redirect, Mr. Remas insisted that he had noted the restrictions of Dr. Brown and Dr. Schwab, in forming his opinion about Mr. Trefry’s ability to work as and electrical snapper, and felt that he could do that job consistent with those restrictions. (T 216)

[I find the failure of Mr. Remas to retrieve the actual duties of the job from Mr. Trefry at the direction of the Employer, and the failure to witness the duties being performed by an electrical snapper, or the cable actually being pulled by the Claimant, to warrant a determination that it be given less weight than that of Dr. Metcalf.]

MEDICAL EVIDENCE:

Dr Schwab:

Dr. Schwab was the Claimant's initial treating physician at the Medical Center at Southwest Marine. Claimant treated with him throughout the month of June 1992, with visits on June 5, 10, 17 and 29, 1992. (Er. Exs. I, J and K) Dr Schwab also issued a final disability evaluation on March 19, 1993 (Er. Ex. L); an examination and report on June 5, 1995 (Er. Ex. T) and a review of Dr. Brown's May 30, 1995 report and Dr. Dickenson's MRI report of September 3, 1992 on October 31, 1995. (Er. Ex. U) Additional responsive reports to those of Dr. Brown, (Er. Exs. DD, GG) and a deposition de bene esse dated January 29, 1999, (Er. Ex. NN) have been received post hearing and are received into evidence.[22]

In his initial report, Dr. Schwab's impressions from the radiographs ordered by him were: "1. Dorsal dislocation, distal phalanx, left ring finger; and 2. Grade II strain, medial collateral ligament, left knee," without apparent evidence of derangement. He ordered a motion brace set at 10 - 90°, crutches, Naprosin and Tarodol were ordered, along with placing him on temporary total disability for three weeks. No other back symptoms, radiographs or treatment was noted. (Er. Ex. I)

In his report of June 10, 1992, the knee and finger were examined by Dr. Schwab, with his finger a "little sore," but otherwise "Ok," and his knee with "some aching." Claimant also complained of some pain in his left hip, and noted his 1988 automobile accident with pelvic surgery resulting from it. A strong odor of alcohol on Claimant's breath was noted, with sweating consistent with it, hostility and unhappiness with everything Dr. Schwab was trying to do for him. The knee showed continued tenderness, but the hip did not. He had a good range of motion. The x-ray revealed the details of the 1998 pelvic surgery. After he had settled down, Dr. Schwab informed him that if he did not have confidence in his physician, he could go elsewhere. On indication that he would remain under his care, he referred him to physical therapy for quadricepts strengthening, three times a week, for the next several weeks. (Er. Ex. J; Ct. Ex. 8)

On June 17, 1992, in response to knee and thigh pain during physical therapy, Claimant visited Dr. Schwab ahead of his scheduled appointment. Examination of the knee revealed tenderness, but nearly a full range of motion, with the statement that Claimant was

[22]Due to the fact that substantial additional time was allocated to the parties to submit additional evidence and responses, all timeliness objections are hereby overruled, and the following documents are received into evidence: Claimant's Exhibits 36, 37, 39, 42, 43, and Employer's Exhibits FF, JJ - NN, to the extent that they may not have been admitted prior hereto.

feeling “normal” responses for the type of injury and rehabilitation. (Er. Ex. K)

On June 29, 1992, Dr. Schwab examined the Claimant for the last time in the treatment series, revealing knee and left finger soreness, and profound left quadricepts atrophy. His impression was, “Grade II medial collateral ligament strain, resolving,” for which he directed continued use of the knee brace and physical therapy. There was no mention of hip or back. (Er. Ex. K)

On March 19, 1993, Dr. Schwab did a final disability evaluation, in which he examined the Claimant, for the left knee, left finger, and to his “surprise,” his low back. The only back complaint he could find was to Dr. Phillips in August 6, 1992 report, following his initial July 13, 1992 visit to Dr. Phillips. Following a summary of each of the above reports, he stated that, “Mr. Trefry’s main complaint is his low back,” which, he stated began on day one.” The Schwab report states that, “The area identified is actually the left sacroiliac junction,” with, “pain ... intermittent and radiating into the left buttock. The finger gives him, “no difficulty,” but he gets a, “dull ache” in his knee. Claimant denied prior injuries to knee and finger, or problems or injuries to back. Dr. Schwab commented on injuries to sacroiliac region, related to the automobile accident in 1988. (Note: These were revealed to the company in Claimant’s employment medical questionnaire. (Er. Ex. L) Dr. Schwab concluded that Claimant was permanent and stationary as of August 24, 1992, per Dr. Dickenson’s report of September 3, 1992; that his knee was “asymptomatic;” that his finger was healed, and that he had no ratable back disability.

Dr. Schwab’s statement that “at no time did he ever make any mention of any back complaints,” is either playing word games on a distinction without a difference, or is just plainly not credible. Claimant, as he testified, was trying to show Dr. Schwab where his injury was, on June 10th. Dr. Schwab “characterized” it as his left hip. The terminology used by Dr. Schwab that Claimant did not “ever make any mention of any back pain,” indicates a word game. This is especially so if Claimant was trying to show him an area that encompassed his low back. I credit Claimant’s testimony that he did so, and note that this is not directly denied by the doctor in his report. Laymen don’t walk around saying that they have a pain in their sacrolilic joint! They say something more in the nature of what the Claimant said that he told Dr. Schwab. Dr Schwab concluded by saying that there was no industrial injury to Claimant’s low back. (Er. Ex. L) **[For reasons stated above, and elaborated further herein, I discredit Dr. Schwab’s evaluation, and therefore, give it no weight.]**

Dr. Schwab testified at the Industrial Disability Hearing of Robert White on June 16, 1998. This was offered into evidence by the Claimant relating to Dr. Schwab’s credibility. (Ct. Ex. 36) It

is not deemed relevant to this proceeding, and is hereby rejected as an exhibit.

On November 20, 1998, Dr. Schwab gave the Claimant another evaluation, again repeating the above results of his prior histories and examinations. In repeating the results of his examinations, he stated: "[O]n none of these occasions did he offer any complaints referable to his low back." I consider this a continuation of the word games of Dr. Schwab denied to circumvent Claimant's references to a low back area that the doctor was characterizing as his hip; only, in this circumstance he did not even mention the hip pain that was recounted in the June 10, 1992 report. He was more concerned with the fact that Claimant had secured legal counsel at that time, who referred him to another doctor, Dr. Dickenson. He noted in the report that while Claimant was not then receiving any treatment for his back, he was doing home exercises, and takes Aleve, but not prescription medicine. This time he acknowledged Claimant's complaints of "constant low back pain," from the day after the accident; now radiating down his left leg, to calf, foot and toes, about once a day, with some to the right leg. While describing his limitations, such as a squatting limit of one minute due to his back, he moved to an inquiry which must have been about sitting limitations, wherein they discussed Claimant's inability to fish, recording Claimant's fishing in a 21 foot boat with his son. Nothing was recorded about what exactly the sitting/ fishing limitations were, and, the fact is that the Claimant does not have a son. The result is a clear indication of how Dr. Schwab chose to pay attention to the Claimant. (Er. Ex. DD)

The results of Dr. Schwab's physical examination were "normal", but noted, that Claimant "does offer complaints of discomfort at the left sacroiliac joint when he "hops on one leg" stating: "there are no complaints of low back pain. **[This is consistent with his initial word games.]** In his review of current radiographs, he finds (for the first time) that: "There is a healed fracture of the body of L1," and finds "a slight residual widening of the S1 Joint." As indicated above, he reviewed the video tapes, finding normal gait; and other responses to be normal, but noting that he seemed to, "preferentially bend at the waist and spine as opposed to bending at the knees." He also noticed him carrying a heavier case on September 12th, with a "contralateral trunk lean in order to balance the weight of the case," but with other moves without apparent difficulty. He noted him sitting with an extreme forward flexion to talk on the cell phone for an extended period of time, without explaining why he would do that. (Er. Ex. DD) **[That statement contradicts my own experience as a lawyer and a judge, in which a person adopts any different or unusual position for an extended period of time sitting straight or leaning forward for such a period is an indication of someone <u>with</u> some kind of a problem! Since I am not a physician, and Dr. Schwab gives no alternative medical explanation as to why the Claimant would sit leaning forward for an**

extended period of time, I am unable to credit his negative explanation based upon the fact that it does not make sense.]

At the end of the report, Dr. Schwab argues that to the extent that there may be legitimate "discomfort to the sacroiliac joints," it is due to the earlier automobile accident and not due to work activities at Southwest Marine. (Er. Ex. DD) **[This simply does not credibly explain why these symptoms to his hip alone would have occurred shortly after the 1992 injury when Claimant had suffered no such symptoms since his recovery from the 1988 accident.]**

On July 23, 1999, Dr. Schwab replied to a report of Dr. Brown, Dr. Dickenson's successor in the treatment of Claimant. He found that the Claimant's MRI did not explain his subjective complaints. **[which he had never credited anyway.]** He disagreed that there was any injury to the Claimant's back, again based on the initial visits, and his above repeated statements on no back complaints. He also rejects the Gait theory of pain on the basis of his belief that that "acute trauma results in acute pain." (Er. Ex. GG) **[This does not explain the numerous cases of soft tissue injuries that have resulted in severe disabilities over the years.]**

On January 29, 1999, Dr. Schwab was deposed de bene esse, post hearing, and his deposition was admitted as Respondent's Exhibit NN. Dr. Schwab repeated the diagnosis of his reports, finding no residual disabilities to either his finger or knee, and denying that the Claimant suffered any injury for his back. (Er. Ex NN p. 12) On cross examination by Claimant's counsel, he refused to answer questions first by his own recollection if he could not independently recall responses to answers, and then by reference to his reports if necessary. (See, e.g., Id. @ 45 - 46) With regard to the second visit on June 10, 1992, Dr. Schwab did not "recall" that the reason he was angry from the first was that Dr. Schwab refused to listen to his complaints, and the only reason that he was going to see him was that he was required to do so for thirty days. (Id. @ p. 48) With regard to the referral for rehabilitation, he also confirmed that the referral was to his wife, who occupied the office next to him. He did confirm that Claimant had some discomfort in the therapy, and then came to see him on June 17, 1992. (Id. @ p. 50) While admitting that, "the back is part of the differential diagnosis of hip pain," Dr. Schwab also confirmed that he ordered only an MRI of the hip and not the back, because his examination involved, "in fact, hip pain ... the left hip which certainly would have involved the left S1 joint." He also confirmed that when he examined the Claimant in March, 1993, when he palpitated the left sacroiliac joint superiorily, Claimant "indicated that that was the type of pain he had experienced, and ... this produced a radiating sensation into his left buttock." (Id. @ p. 57 - 58)

Referencing Dr. Dickenson's MRI scan, "revealing a small central disk herniation at L5-S1," he stated that it was "not necessarily an indication of injury." (Id. @ p. 60) He also confirmed that "appropriate symptoms" together with a finding of a disk abnormality could point to such an injury. (Id. @ p. 61) He admitted that he took the March, 1996 affidavits of Cindy Spell and John Pickett into consideration in rendering his opinions after that date. (Id. @ 69) Claimant's counsel questioned Dr. Schwab regarding his summary in the June 6, 1995 report, that Claimant said he was "paralyzed" after his 1988 accident, he clarified that to mean for 10 - 12 days he could not walk, and then said that he had no restrictions, that was also clarified by Mr. Trefry, as was the extent to which he had taken prescription medicines; the fact that he took Advil, not Aleve as stated in the report, and that in the list of body parts injured in 1992, he also mentioned his ankle, which was omitted by Dr. Schwab. (Id. @ p. 81) He also misrepresented the date that Claimant actually told him that he started to water ski, and when he last waterskied. (Id. @ p. 82) (He admitted to using a summary of Cindy Spell's affidavit in front of him to refresh his memory on these points. [Ibid.] **(Cindy Spell's affidavit is wrong chronologically on these points.]** He again confirmed the reference to a boat of the Claimant's son, in his report, when Mr. Trefry does not have a son. (Id. @ p. 85) **[At the hearing, I initially felt that the details about Advil vs. Aleve and the question of the non-existent son's boat were nit-picking, but I allowed them into evidence. I now believe that they are, in fact, indicative of Dr. Schwab's lack of attention to the Claimant, and the fact that he was not listening to the Claimant. I credit the Claimant on this point, as further support for giving less weight to Dr. Schwab's report.]**

Drs. Dickenson and Brown:

Claimant was first seen by Dr. Dickenson[23] on July 13, August 20 & 24, September 22, October 21 and November 30, 1992, and had an x-ray directed by him on September 3, 1992. He also issued reports on March 20 and May 4, 1993. (Ct. Exs. 9 - 18) Thereafter, following the death of Dr. Dickenson, Claimant treated with Dr. Brown. He saw him on May 30, 1995, and issued reports for that day and on August 9, 1995, which he supplemented on November 6, 1995 (Ct. Exs. 19 - 21) Dr. Brown also issued reports on September 16, 1996, August 29, 1997 October 17, 1997(Supplemental for sub rosa videos). (Ct. Ex. 22 - 23) Post-hearing documents of Dr. Brown (his declaration

[23]See discussion on Exhibit 34, in Appendix A. Dr. Dickenson's letterhead report lists him as a Diplomate, American Board of Orthopaedic Surgery. I hereby take judicial notice that Phillip Hugh Dickenson, M.D., received a lifetime certification as a diplomat of the Board of Orthopaedic Surgery on January 29, 1955, which he maintained until his death on August 2, 1994. It will be credited as his primary qualification in this matter based upon judicial notice of this credential.

and resulting interrogatories during his cancer treatment) appear as Exhibits 42 and JJ-MM discussed herein.

Dr. Dickenson discussed that July 13, 1992 visit in his report of August 6, 1992. He related the fall, immediate severe and finger pain, and being unable to walk. He recounted his examination and x-ray by Dr. Schwab to the left knee and left fourth finger, diagnosis of strain of a ligament, and referral for therapy four or five days later. The therapy consisted of strengthening exercises, use of a bicycle, and left knee icing. A week later he returned, requested an MRI from Dr. Schwab, and he refused. He states he began to develop low back and left hip pain and was given a knee brace by Dr. Schwab. (Ct. Ex. 9; Er. Ex. 0)

Dr. Dickenson then reports Claimant's summary of his 1988 automobile pelvic and vertebrae fractures, and his collapsed lung, with his eighteen month treatment and full recovery, except for "minor epispodic numbness on the left." Besides residual finger and knee pain, Claimant complained of back and hip pain which increased with continued sitting, with pain radiating across the buttocks. He limited his pertinent findings of the orthopedic exam primarily to the lower back and lower extremities. Basic standing, gait, flexion, bending and motion tests for the back were normal. Besides finger and knee analysis, his impression included: "Sprain of the lumbar spine superimposed upon pre-existing injuries consisting of fractures of pelvis and spine in a previous MVA." He reported that no medical records were available for his review. He suggested x-rays, waiting the six week period, and starting a rehab program. In "factors for disability" portion of his report, he considered the Claimant's knee and low back pain as, "slight, increasing to moderate with activity."

In his August 20, 1992 report of Claimant's August 10, 1992 office visit, Dr. Dickenson notes evidence of nerve root irritation with discomfort following the June 5, 1992 injury. He directed an MRI due to the "persistent symptomatology in the knee ... to rule out possible internal derangement," and be checked again following the MRI. (Ct. Ex. 10) An MRI of the knee resulted in return on August 24, as reflected in Dr. Dickenson's September 3, 1992 report, with the knee healing and no evidence of cartilege damage, but with "increasing discomfort with his back with radiation into his left leg." (Ct. Ex. 12) In that report, Dr. Dickenson also reviewed medical records received from Dr. Schwab of June 5 and 10, 1992, the latter of which recounted the left hip AP pelvis view and history of the 1988 injuries, his current injuries and recommended therapy. He did his own examination, repeating the complaints of left leg paresthes, nerve root irritation as a result of previous accident, and discomfort following the most recent injury. He directed an epidural block, and, if unsuccessful, an MRI of the lumbar spine. (Ct. Ex. 12)

The August 24th visit resulted in the lumbar spine MRI on September 3, 1992, with the impression: "Small central disc herniation at L5-S1. Moderate bilateral neural foraminal narrowing." "The radiology report by Dr. Prager also stated: Mild degenerative changes are present in the L5-S1 disc. There is a small midline disc herniation at this level. This just barely touches the dural sac and transversing the S1 nerve roots. It does not appear to compress the S1 nerve roots with the patient in the supine position." (Ct. Ex. 11)

On September 14, 1992, Dr. Dickenson saw Claimant in his office again, and issued his findings in a report of September 22, 1992. (Ct. Ex. 22) He recounted the above MRI findings which, he stated, "would explain then pain in the back with radiation into the left leg." He again suggested the epidural block.

On October 10, 1992, reported on October 21, 1991, he saw the Claimant after an epidural block that, "did not appreciably alleviate his back and leg pain." In addition, Claimant was having leg cramps. Dr. Dickenson stated that Claimant, "does have a protrusion, mild to moderate, of the lumbosacral disc with foraminal stenosis." (Ct. Ex. 14)

On November 30, 1992, Dr. Dickenson issued a permanent and stationary medical/legal report, which included an examination of the Claimant on November 23, 1992. (Ct. Ex. 15; R. Ex. Q) His knee was "under control," but his back was the main problem, with, "some radiation of pain into the left leg." He again noted that previous MRI with its small protrusion of the lumbosacral disc. His back studies, besides pain, were otherwise normal, but he noted the following subjective complaints:

> Occasional slight pain in the low back with some radiation into the left leg, increasing to slight to moderate with slight activity, becoming moderate or greater with performing heavy lifting.

With this he repeated the MRI findings as set forth by Dr. Prager, above, and directed work restrictions that would preclude heavy lifting from his back condition, and repetitive climbing of stairs or ladders, kneeling, squatting or crawling. He rejected "apportionment," recognizing that Clamant had a slight residual sequele from his previous injury, but was able to return to unrestricted heavy work. **[Insofar as his finding of a "slight residual sequelae" not warranting "apportionment" is concerned, this does not preclude a relationship between the two injuries for Section 8 (f) purposes. It is my opinion that the 1992 injury would not have been as serious as it was, but for the prior injury, and that such relief is, therefore, warranted. I credit the Claimant's repeated references to the hip/ low back area; that this is factually related to the old S1 fracture, and the "new" L5-S1 disc**

herniation.] Dr. Dickenson also indicated that future medical benefits may be required for "surgical intervention in the low back," and "therapy from time to time." (Ct. Ex. 15)

On March 18, 1993, clarifying his report of November 30, 1992 in which he gave an opinion of permanent partial disability under the California system, Dr. Dickenson issued a report in which he found none to the knee, and a five percent impairment of the whole man based upon a clinically established disc derangement, non-operated at this time, under the AMA guidelines. (Ct. Ex. 16; R. Ex. R)

On May 9, 1993 he responded to the report of Dr. Schwab disagreeing with his interpretation of the MRI scan in relation to Claimant's symptoms, and based upon Dr. Schwab's normal back and lower extremeties examination and evaluation. While Dr. Dickenson would concur that the MRI alone was not a suitable basis for such a determination, the complaints of back pain are of "some significance", justifying the limitations "prophylactically." He disagreed with the attribution to the 1988 accident, stating that the present problem was more due to the disc abnormality than to the sacroiliac joint. (Ct. Ex. 17)

On May 30, 1995, following the death of Dr. Dickenson, Dr. Brown did his first qualified medical examination of the Claimant. While repeating the history of Dr. Dickenson's prior reports, he reported Claimant's current complaints as including current pain in his lumbosacral spine daily, and which would "refer down his left leg" about once a month. He recounted both Dr. Dickenson's reports, and Dr. Schwab's March 19, 1993 disagreement with Dr. Dickenson, and finding minimal pain, no objective factors of disability and a full range of motion, as well as no back complaints in the month that he treated him. He reviewed Dr. Dickenson's reports and his permanent and stationary examination of November 30, 1992, with his MRI reading of moderate bilateral L5-S1 disc and grade II tear to the left knee, then his March 4, 1993 "flare-up" of back pain, which matched the MRI findings, and for which he prescribed Relafen. Among his diagnoses regarding the finger and knee, as well as history from the 1988 accident, he found a "sprain in the lumbosacral joint. According to the MA guidelines he found no loss of motion to the back, but a lumbosacral disc with symptoms according to AMA Table 49 gives him a five percent impairment of the whole person. He prescribed future medical treatment of Motrin and Aleve for relief of his back pain. He found that Claimant would not be able to perform the usual and customary duties of electrical snapper, due to restrictions on climbing, squatting, walking on uneven ground, and lifting. (Ct. Ex. 18)

On August 9, 1995, Dr. Brown reviewed Dr. Schwab's disagreement with his above determination, and requested additional documentation, (Ct. Ex. 19) and on November 6, 1995, supplemented his prior report considering two affidavits of Ms. Spell and Mr.

Pickett regarding alcohol use which he simply referred to as hearsay. He credited his return to full duty without restrictions, after his 1988 injury, and would have been considered totally rehabilitated. **[There is no evidence to contradict that.]** (Ct. Ex. 20)

On September 16, 1996, Dr. Brown conducted an examination of the Claimant, and reviewed all of the conflicting reports of Drs. Schwab and Dickenson. Claimant's remaining symptoms were then in his back with pain that remains over the left sacroiliac joint into his left thigh. He had received vocational rehabilitation, and was working for a company repairing copy machines. He reviewed the 1988 accident medical records in detail, and then those from the subject 1992 accident. The post-1988 accident series included one radiology report from March 5, 1992, before his Southwest Marine accident, which also included a flouroscopy for an epidural injection, relating to low back pain. He then objectively reviewed the above reports of Drs. Schwab and Dickenson in detail, along with memoranda reports of Drs. Greenberger, Dickenson, and Velky, and one on review of those of Orthopedic Medical Group, plus a letter from Dr. Schwab to Attorney Taylor, all from 1995 except that of Dr. Dickenson from 1992. On examination, in addition to the 1988 injuries and 1992 knee tear, he diagnosed a small central disc herniation at L5-S1, with foraminal narrowing and sprain in the lumbosacral joint. He verified that the Claimant was permanent and stationary as of September 30, 1992, in agreement with Dr. Dickenson. (Ct Ex. 21)

To reach his conclusions Dr. Brown considered the complaints of minimal to slight pain while not at work, but with long driving and sitting, and in various positions required for copy repair, minimal to slight pain in the lumbosacral spine. The MRI evidence provided an objective factor in reaching his diagnosis, along with a loss of knee jerk. His restrictions from the lumbosacral spine include heavy work and prolonged sitting. Under AMA Guidelines, he does experience pain when sitting for prolonged periods of time which radiates to his left sacroiliac and occasionally down his posterior hamstring area of his left thigh. He otherwise has a full range of motion, but exhibits an absence of left knee jerk. He has a minor impairment with clinical signs of lumbar injury present, and with radiculopathy and loss of reflex. (Ct. Ex. 21) Future medical care will require physical therapy for his back on a symptomatic basis, and anti-inflammatory drugs. He agrees with Dr. Dickenson on apportionment, based upon 3 ½ years of ability to perform the usual and customary duties of his job: None. (Ibid.)

On August 29, 1997, Dr. Brown performed a follow-up examination due to continued left sided buttock and leg pain on a continual basis. Dr. Brown explained to the Claimant that the September 4, 1992 MRI scan's showing of the L5-S1 disc herniation and moderate foraminal narrowing the disc bulge does "touche (sic) the dural sac and the S1 Nerve roots.... and mere contact can cause sciatic type symptoms, such as he is experiencing on the buttock area and the

left leg." He noted that there, "may be more compression in the loaded upright position that is not evident on the MRI scan, since the MRI Scan is performed while the patient is laying in the prone position." He concluded that, "the left sided buttock pain and leg pain is being caused by the objective findings of the MRI scan. (Ct. Ex. 22)

This report was followed by another on October 17, 1997, reviewing the sub rosa video tapes. He observed Claimant "retrieving objects" from his car, with two of insignificant weight held by the fingers. The majority involved Claimant making a cell phone call while he, "sits, stands, and supports himself with one leg ... and ... walks around with the phone." None revealed heavy lifting or repetitive bending for more than a few seconds. They did not indicate that he, "is engaged in repetitive heavy labor." More importantly, he concludes:

> His abilities to compete in the labor force are not clarified by this meaningless strip of film occupied with only a few seconds of the patient bending over the trunk of his car and picking up objects. (Ct. Ex. 23)[24]

Dr. Brown's Post-Hearing Interrogatories:

As noted in footnote 2, Dr. Brown has suffered a severe illness (cancer)which then prevented him from being deposed post-hearing, in accordance with the arrangements that had been made at the hearing. This resulted in several exchanges of correspondence and telephone conference calls, and an order dated May 25, 1999 by the undersigned, for reasons stated therein, (See, ALJ Ex. 24, and discussion @ p. 11, *supra*) that the Claimant be allowed to submit written interrogatories to Dr. Brown to preserve his opinion on these matters; that Respondent/ Employer be provided the opportunity to also submit written interrogatories to Dr. Brown in response to those of the Claimant, and that physician be permitted to submit a review of the responses by Dr. Brown. (See, Er. Exs. HH and II.) The Employer has vigorously opposed the manner of resolving this matter by written interrogatories, and I have overruled those objections.

[24]I had the occasion to read this review of the sub rosa film after I had played and reviewed the film twice, in an attempt to discern its relevance and weight. This view of Dr. Brown accurately reflects my own opinion of the film, both as to the injury itself and with reference to Claimant's new job as copier repair serviceman. In terms of this application for benefits, I found it to be a colossal waste of money and of both the parties' and the court's time.

The Declaration of James D. Brown, M.D., (Ct. Ex. 42) and Post-hearing Interrogatories of Dr. Brown (Er. Exs. JJ - MM); and Employer's Objections thereto (Er. Exs. HH and II):

First, the May 17, 1999 Declaration of James D. Brown, M.D. must be considered. Under cover of a letter dated May 18, 1999 from Mr. Cohen to the undersigned, the Claimant enclosed a statement captioned, "Declaration of James D. Brown, M.D., both of which have been identified as Claimant's Exhibit 42. In it, Dr. Brown verifies his status as a Diplomate of the American Board of Orthopedic Surgery, as set forth in his CV. (Ct. Ex. 24) On May 19, 1999, the Employer submitted its objections thereto. (Objection: Due Process - Right to Cross - Examine.) (Er. Ex. HH)

The Declaration was preceded by the following history: At the end of the hearing, provision was made to take the deposition of Drs. Schwab and Brown in January, 1999. This schedule had to be adjusted to permit the scheduling of Dr. Schwab's deposition first, on January 29, 1999, and Dr. Brown's within thirty days thereafter. (See, order of the undersigned dated January 22, 1999. - ALJ Ex. 14) Thereafter, Dr. Brown then became seriously ill with cancer, and was directed to begin a course of chemotherapy which rendered him unable to give a deposition. On February 26, 1999, Dr. Brown's deposition was continued due to his chemotherapy treatments, (See, the supplemental order of the undersigned dated February 26, 1999. - ALJ Ex. 15) and was delayed again on March 11, 1999. (See, second supplemental Order dated March 11, 1999. - ALJ Ex. 16) Additional continuances were granted on March 19, 1999 and April 13, 1999, all based upon Dr. Brown's condition. (ALJ Exs. 17 & 18) The latter was done by a pro forma stamp stating, "Granted" on an April 12, 1999 letter submission by Mr. Cohen. The letter also requested that he be allowed to either attempt to prepare a declaration for Dr. Brown's signature, or providing a status update in 25 days. To the "Granted," the following was, therefore, added: "Re: Dr. Brown - Allow 30 days due to extraordinary circumstances. Have him sign and submit a sworn statement." On April 13, 1999, respondent objected to Mr. Cohen's offer to prepare a declaration for Dr. Brown's signature. (ALJ Ex. 19) On April 20, 1999, I issued an order modifying the extension of time to depose Dr. Brown and to file briefs, based upon the said objection, and set a briefing schedule for June 1, 1999. (ALJ Ex. 20) On May 12, 1999, Mr. Cohen notified the undersigned that another tumor had been identified, and informed the undersigned that he would seek his declaration, and submit it by the following week. (ALJ Ex. 21)

Claimant's Exhibit 42 resulted therefrom, and is objected to on the basis of inability of the Employer to cross-examine Dr. Brown. (Er. Ex. GG)

Following this exchange, on May 20, 1999, Claimant's attorney, Mr. Cohen proposed that, in light of Dr. Brown's continuing serious illness and ongoing chemotherapy, to meet the objection that there was no opportunity for cross-examination, the Employer submit interrogatories, with follow-up interrogatories by both parties. (ALJ Ex. 22) The proposal was vigorously opposed by the Employer's counsel by letter on May 24, 1999. (ALJ Ex. 23) On May 25, 1999, the following order was issued by the undersigned:

> Claimant has requested that due to Dr. Brown's severely weakened condition as a result of cancer, that he be allowed to submit written interrogatories to Dr. Brown, to be responded to, and signed, under oath. Respondent vigorously opposes this request, maintaining that responses should be subject to cross examination in a deposition. It is apparent, based upon the representation of counsel for the Claimant, that Dr. Brown will be unable to undergo a deposition in his present condition, that his condition is not expected to improve and that this procedure is necessary to preserve his opinion for the record, an opinion which will not be otherwise available to the Claimant without such a submission.
>
> In the interest of fairness to the Respondent, however, it also appears that if Claimant is to have the benefit of submitting such interrogatories for responses under oath, Respondent should be entitled to a minimum of answers to interrogatories from Dr. Brown submitted by it, to respond to those submitted by the Claimant. It would also then be appropriate that the Respondent be allowed to submit Dr. Brown's report, and any other documents already in the file, to one physician of its own choosing for a further evaluative opinion the medical evidence, including Dr. Brown's responses to these interrogatories. Under the circumstances, it is my opinion that such a procedure will place the Respondent on an equal footing with the Claimant in this matter under the provisions of 20 C.F.R. § 18.13 (discovery methods including interrogatories), § 18.18 (written interrogatories to parties), § 18.22 (depositions, including written interrogatories), and § 18.29 (authority of Administrative Law Judge general powers). Recognizing that this procedure does not fit squarely within the proscriptions of §§ 18.13, 18.18, and 18.22, I am exercising my general powers under 20 C.F.R. § 18.29 and, in particular, § 18.29(a)(9), to issue an appropriate order, considering the circumstance of Dr. Brown's physical condition, to preserve his opinion and to preserve equal fairness to the parties. Such responses will then be admissible into evidence, and I will then be able to assign appropriate weight in my decision and order. Therefore,

> IT IS ORDERED that the Claimant be permitted to submit interrogatories to Dr. Brown for response under oath, subject to the representations of Claimant's counsel as stated in his letter of May 24, 1999, and provided that the Respondent be permitted to submit its own interrogatories for response under oath from Dr. Brown, and that the Respondent also have the right to submit all of the medical evidence to another physician for further evaluation. (ALJ Ex. 24)

On July 14, 1999, the undersigned issued an order clarifying that of May, 25, 1999, and a revised briefing schedule. (ALJ Ex. 25)

The Employer claims that the admission of the Post-Trial "Declaration" of Dr. Brown is hearsay and its admission denies Employer's right to due process by cross-examination of the witness. Arguing as such, Employer seeks to reject Dr. Brown's declaration (i.e. report) as a trial exhibit. I find that Employer's argument is without merit. In addition to the provisions of Sections 18.13, 18.18, 18.22 1nd 18.29 of the Department's Rules for hearings, previously cited by the undersigned, under Sections 702.338 and 702.339, an administrative law judge has the authority to admit relevant and material evidence post hearing, and, in doing so, is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure. (See also, In re: Wayland v. Moore Dry Dock, 21 BRBS 177 (1988)). The submission of additional medical evidence after the hearing may be admissible even if the ALJ "could have concluded his consideration of the claim without the additional evidence, had he chosen to do so." *Id*. at 181.

Post hearing evidence may be admissible if the source of that evidence was unable to testify. In Longo v. Bethlehem Steel Corp., 11 BRBS 654 (1979), relying on Richardson v. Perales, 402 U.S. 389 (1971), the Board upheld the admission into evidence of ex parte medical reports, despite their hearsay nature. It reasoned that since the judge permitted a post-hearing deposition of the doctor, the right of cross-examination by the adverse party was protected. In the same vein, the Court in Avondale Shipyards, Inc. v. Vinson, 623 F.2d 1117, 1121 (1980), held that the ALJ, "provided an adequate means for the protection of [employer's] rights" by allowing the opportunity for post-hearing interrogatories or depositions. The Avondale court further stated,

> [B]ecause only [the report of claimant's physician] was introduced uncoupled with live testimony, no demeanor evidence was available to affect the ALJ's perception. Employer, in fact, may have been placed at a considerable advantage. By proceeding post-hearing, not only would employer have had the luxury of additional time to prepare its questions, it would have had the benefit of a hindsight unavailable under

traditional cross-examination; claimant's entire case would have already have been presented.

Id. at 1122.

Notably, the Avondale Court held that either post-hearing depositions or interrogatories were sufficient to protect the employer's due process rights.

In the present case, Dr. Brown's medical report is relevant and material to this case. He is the only physician of Claimant's who has knowledge of his current back condition. Furthermore, the hearsay nature of this report does not preclude its admissibility pursuant to an ALJ's freedom, in certain circumstances, to stray from the Federal Rules of Evidence. (See, In re Wayland, *supra.)* Finally, as discussed in Avondale Shipyards, a case quite similar to the matter *sub judice*, the admission of Dr. Brown's report does not violate Employer's due process rights, because the undersigned permitted an opportunity for cross-examination by post-hearing interrogatories – an opportunity availed by the Employer. (See Avondale, *supra;* Longo, *supra.* For reasons that are set forth in detail above in discussing Employer's Exhibit HH, Dr. Brown's declaration, Claimant's Exhibit 42, is admitted into evidence. Exhibits JJ - NN, the post hearing interrogatories are also admitted. The weight to be given to each is separately considered under the summaries of Dr. Schwab's and Dr. Brown's medical reports.

Recognizing that Exhibits HH and II are actually statements of position, and have no evidentiary value, they continue marked as Employer Exhibits HH and II for reference purposes, but are not received into evidence.

A May 24, 1999 letter from Mr. MacLeod's office, under signature of Ms. Catalano, vehemently objects to Claimant's proposal to submit interrogatories to Dr. Brown, and repeating the objections set forth in Exhibit HH. In support, and attached to that letter is an exhibit that contains excerpts from Dr. Brown's deposition of August 27, 1993, in another proceeding involving a California state worker's compensation claim captioned, Louis Torres v. Southwest Marine, Inc., et al., OWCP No., 18-46964, et al., (1993). In it, the Employer complains of references by Dr. Brown to use of subjective complaints of pain to determine disability. For the reasons stated with regard to similar submissions by the Claimant in Claimant's Exhibit 36, it is without foundation, and is deemed not to be relevant to this proceeding. Furthermore, insofar as it is considered to be offered as an exhibit herein, the deposition excerpt is **rejected** and will not be considered in this decision. The rest of the statement will be considered as a statement of position, and will be considered accordingly. **Rejected as an Exhibit**.

Dr. Schwab's deposition of January 29, 1999 in has been marked as Employer's Exhibit NN, and is received into evidence. Admitted.

Dr. Brown also verifies that each of his reports in evidence as Exhibits 18-23 and dated May 30, 1995, August 9, 1995, November 6, 1995, September 16, 1996 August 29, 1997 and October 17, 1997, were personally dictated, reviewed and signed by himself, and that they were accurate and correct. However, he stated in his May 17, 1999 declaration that the July 14, 1995, State of California, IMC 2002 form, captioned, "The Qualified or Agreed Medical Evaluator's Findings Summary" (Er. Ex. V) was prepared by a clerk in the office, who was instructed to complete the form based on information in his narrative report. He stated that this one was, "incorrectly completed in numerous respects," and he did not review it carefully and missed inconsistencies. (See, discussion regarding report of Employer's Exhibit V, which is discussed with the Claimant in his testimony. (T 326 - 327; and see, p. 19, *supra*.)

In Employer's Exhibit V, under "Medical Issues," Dr. Brown had noted under Section 13. a., "Did work cause or contribute to the injury or illness? Causation," what was obviously, an "X" that was supposed to be under the "Yes." However, the "Yes" ended up under the "Report pages or section(s)" where the "causation" belonged due to a printing error. Then, under 13. b., involving preexisting conditions, and listed under "Report pages or section(s)" as "Apportionment," he checked, "No," and under 13. b., relating to "Future Medical," he checked, "Yes." Under subsections 13. c. which asks, "Is the medical condition stable and not likely to improve with active medical or surgical treatment (i.e., is the condition permanent and stationary?" and which he characterized as "Disability Status" under the "Report pages or section(s)" he checked the "Yes," block in answer to the question, although it may have been asking two different questions. (Er. Ex. V)

In contrast, in subsection 13. e., in response to the question, "Is there permanent impairment?", he summarized the report page or section as "work restrictions" and checked, "NO." He then responded to the Subsection 13. f. question, "Can this patient return to their usual job.", with a "Yes" checkmark, and also checked the next "Yes" block as "Without restrictions as of "5/30/95," and the "No" block as it related to "No restrictions." (*Ibid.*)

He then concluded, responding to question 14, "Are there subjective complaints?", with a "No," and to 15., "Are there any physical findings?", also with a "No." (*Ibid.*)

Among the diagnoses, he did list, "sprain, lumbosacral joint," and "history of pelvis fracture," and also that other physicians were consulted. (*Ibid.*)

In review of Exhibit V, Dr. Brown contended in his declaration that the format of the State of California form is different from the Longshore forms, and that this may have confused the clerk. He stated that, "Clearly, I was always of the opinion that, Mr. Trefrey could not return to his usual job, he has consistently suffered subjective complaints relative to his industrial injury while working for Southwest Marine and he has suffered permanent impairment." **[Having read all of Dr. Brown's other reports in this case, it is an objective fact that the California report is facially inconsistent with all of the other reports of Dr. Brown, and I therefore credit the collection in his declaration. For this reason, rather than considering it merely an inconsistent report, I deem it to be an incorrect statement of his view of Mr. Trefry's disability for the reasons explained by him, and give it no weight. I also want to state to Dr. Brown, that his careless review of the California form, before he signed it, at a time that was well before his present illness, has caused an immeasurable amount of work on behalf of both this court and the parties to this proceeding. If I had it within my power to do so, I would consider issuing a sanction for allowing the report to have issued in the first place.]**

As a second matter addressed in the declaration, Dr. Brown states that it is not usual or customary, and in fact is unusual and almost unheard of, for a physician in the San Diego community to throw away their reports after receiving their typewritten reports. It is "usual" for the physician to retain chart notes, notes from interviews with patients, and other notes pertaining to a patient, for future reference and to verify or corroborate the accuracy of such generated reports. (*Ibid.*) **[This is contrary to the testimony of Dr. Schwab, but does not shed much light on the question of whether the Claimant told Dr. Schwab that he had back pain during his early visits. It does raise questions about Dr. Schwab's practices, and a question of whether such notes would show that, but does not, itself, forge the link necessary to conclude that he did.]**

Dr. Brown stated in his report that a normal range of motion is not necessarily inconsistent with a herniated disc, or even one requiring surgery. (*Ibid.*) **[This is in contrast to the opposite question posed by the Employer as to whether a normal range of motion, without other evidence, would equate to a herniated disc, discussed below. For the Employer's comfort, I recognize that it does not.]**

He reaffirms that it is his opinion that Mr. Trefry's subjective complaints correlate to the findings he observed on the MRI scan of a small central disc herniation at the S1-L5 that touched the dural sac and the S1 nerve roots. These correlate to Mr. Trefry's experience of pain in his left buttock area and down his left leg. (*Ibid.*) He then states that based upon his review of all of the medical records, and his multiple examinations of eh

Claimant, "it was and is my opinion that Mr. Trefry suffered a sprain of the lumbosacral joint, making symptomatic a small central disc herniation at S1-L5, at Southwest Marine, Inc., on or about June 5, 1992." He then concludes that since the date of the injury, due to the above findings, he is, "precluded from performing the climbing, squatting, walking over uneven ground, and lifting required by his occupation as a snapper electrician at the time of his injury." At this point he recounts some of the requirements of the job, such as lifting up to 100 lbs., repeatedly climbing ladders, working in awkward and twisted positions for prolonged periods of time, and seated on hard surfaces for such periods of time. His opinion is that Claimant should not do any of the above motions repeatedly, and that therefore, he was precluded from performing his usual and customary duties of snapper electrician. He will require future medical care and physical therapy on an as-needed basis. The sub rosa films mentioned above do not alter his opinion, and do not depict activities inconsistent with his reports. **[This statement repeats those set forth in his above cited reports. In the final analysis, the admission or non admission of this report does not change my determination in this matter.]**

Dealing with the post-hearing interrogatories and responses served on Dr. Brown, (Er. Exs. JJ & KK) when asked to explain why he concluded that Claimant suffered a sprain of the lumbosacral joint, making symptomatic a small central disc herniation at L5-S1 during the incident that occurred on June 5, 1992, he stated that he relied on Mr. Trefry's responses to the injury. Noting the details of the fall, and the prior open reduction and internal fixation of the pelvic fracture, he stated that the pelvis fractures can be aggravated and cause the patients to experience low back pain. It is reasonable to conclude that the injury was present but not disabling for a reasonable period of time before the 1992 injury, and that the new injury was causative in making the small disc at L5-S1 flare up. When asked to explain why he correlated Claimant's subjective complaints to the findings he observed on the MRI scan of the small central disc herniation at L5-S1 that touched the dural and S1 nerve roots and that these correlated to his experience of pain in his left buttock area and down his left leg, Dr. Brown responded that a disc begins to degenerate as early as the teens, but does not become symptomatic at the time of its earliest degeneration. Nothing tells the physician whether the area of irritation was from recent trauma or some pre-existing injury. Reliance on the history would lead to the conclusion that the accident caused it to become symptomatic. (*Ibid.*)

In response to the question about Dr. Schwab's statement that Claimant did not tell him about the low back injury on his first visit, but with the assumption that he did tell it to others resulting in the June 16, 1992 claim, and also assuming that he made low back complaints to Dr. Schwab at his subsequent visits, Dr. Brown stated that it would not be unreasonable to assume that the

back pain could have been present but not mentioned. It would also not be unreasonable to assume that the condition in the back as shown on the MRI and pictures from the pelvic reduction would indicate some ongoing symptoms that were not work-disabling. (*Ibid.*)

In response to a question on the Gait theory of pain in which the primary sources of pain would distract a patient from offering any but his major symptoms, Dr. Brown stated that he would be surprised if the patient had been given a direct question on whether he had any back pain. It would also be reasonable to assume that a patient who was experiencing back pain common to patients who had prior surgery to the pelvic ring would have an aggravation. (*Ibid.*)

With regard to the activities curtailed by his injuries, Dr. Brown stated that it is reasonable to assume that Claimant could not perform heavy lifting or repetitive bending, which were functions of his electrical snapper job. This is even more reasonable when he is presumed to have injuries such as his fractured pelvis in 1988, and the demonstration that he has degenerative disc disease with herniation affecting his left S1 nerve root. Surgical decompression, however, was a factor that had not been previously considered, either by prior treating physicians or by him. (*Ibid.*)

As the final word on this from Dr. Brown pursuant to interrogatories by the Employer, (Er. Exs. LL & MM) he first acknowledged that the Qualified or Agreed Medical Evaluator's Findings and Summary (Er. Ex. V) and the report of Mark Remas, (Er. Ex. Y) were part of his evaluation, and that he did not request an electrical snapper job description from the Employer. In response to a question on his agreement with Dr. Schwab and Dr. Dickenson that a normal range of motion of the back in the presence of a herniated disc does not equate to a disability in the absence of other evidence of impairment, Dr. Brown replied: "This is a double negative question referring to a disagreement with ..." Drs. Schwab and Dickenson. "My answer is that it is usual for a patient with a herniated disc to have a restricted or protective range of motion, but it would not be a rare finding." The question was compound and subject to objection. The response basically noted that as a double negative, but was unclear. The "it" in "but <u>it</u> would not be a rare finding," could have referred to, "it is usual for a patient with a herniated disc to have a restricted or protective range of motion," or it could have referred to, "a normal range of motion of the back in the presence of a herniated disc does not equate to a disability in the absence of other evidence of impairment," as set forth in the Employer's question five. Since Dr. Brown was answering question five, I take it to be an admission of the statement in the question: "A normal range of motion in the presence of a herniated disc does not equate to a disability in the absence of other clinical evidence of impairment," and I so find, as above stated. **[This is also consistent with the statement in his declaration of May 17, 1999**

that: "[A] normal range of motion is not necessarily inconsistent with a herniated disc, or even one requiring surgery.]

In the absence of a copy at home during his illness, Dr. Brown does not answer the question on the AMA Guidelines, where it refers to subjective complaints in the absence of sufficient clinical findings. **[This response does not change my prior opinion under Longshore decisional case law to the effect that a claimant's credible complaints of pain alone may be enough to meet the employee's burden. See, Richardson v. Safeway Stores, Inc., 14 BRBS 855 (19982) In the final analysis, it is the credible complaints of pain, credited by both Dr. Brown in his reports and the undersigned, and the credible evaluation of those reports in conjunction with the objective medical evidence by Drs. Dickenson and Brown, in the form of Dr. Prager's MRI reading, that provides the basis for my decision to award benefits herein.]**

In terms of distinguishing Claimant's sciatic nerve pain attributable to his pelvic injury as opposed to his lumbosacral sprain, Dr. Brown states that he relies upon his letter of June 6, 1999. There is no letter from Dr. Brown in the record dated June 6, 1999. The only such timely letter is his June 23, 1999 letter in response to the interrogatories of Mr. Cohen, dated June 7, 1999. It does not directly discuss sciatic pain, but does restate prior findings on pain such as, "these fractures in the pelvis can be aggravated and cause patients to experience low back pain;" the 1992 injury, "made a small disc at L5-S1 flare-up." He does discuss sciatica in his September 16, 1996 and August 29, 1997 reports. (Ct. Exs. 21 & 22), as discussed and credited, above. (*Ibid.)*

Even though Claimant has not received back treatment since 1992, Dr. Brown verified that Claimant could not return to his prior occupation due to his weigh lifting and bending restrictions (stated above to involve repetition,) and to not pull cable, which would cause back pain. (*Ibid.)* The pain since his pelvic injury and injury in 1992 is not constant, but is spontaneous, and occurs more frequently when bending or lifting. Dr. Brown confirmed that Mr. Cohen drafted the May 17, 1992 declaration. (*Ibid.)*

Dr. Brown stated that the first reference by the Claimant to back pain was that it occurred the day after his injury, as set forth in his initial report, following the death of Dr. Dickenson. (Ct. Ex. 18) He confirmed that his advancement of the "gait theory" is based on the possible examination made three years post injury. A knee which has been injured can periodically hurt and cause a limp, but implies periods when the person would walk without a limp. (*Ibid.*)

[**With the exception of Dr. Brown's elaboration on the relationship of Claimant's low back pain to his prior, severe, pelvic ring injuries, the responses to these interrogatories are not considered significant in evaluating the medical reports previously submitted, and do not affect the results of my determination on the nature and the extent of the injury in this matter.**]

Summary of Findings of Fact

Uncontested facts:

1. In 1988 Claimant had an automobile accident, with severe injuries to the pelvic ring/sacroiliac joint area, that involved a fracture through the sacrum, from the S1 to the foraminal area, and from which he recovered sufficiently to resume a normal working life, with no apparent disability.

2. Following an intensive therapy and rehabilitation program, Claimant returned to work at Southwest Marine as an marine electrician, demonstrating no effects from the 1988 injury before his current injury.

3. On June 2, 1992 Claimant was working for Southwest Marine as an electrical snapper, a position that he had held for the previous six months, when he had a slip and fall work injury while descending a vertical ladder, onboard a vessel.

4. In the fall, one foot slipped through the ladder and he fell to the deck, twisting his body, with his left arm extended to break his fall.

5. As immediate injuries initially reported to Southwest Marine Medical Center physician, Dr. Schwab, Claimant dislocated his left index finger and suffered a Grade II medial collateral ligament strain to his left knee, for which Dr. Schwab did a closed reduction to the finger, and provided a brace for the left knee, plus medication, and directed physical therapy and a three week temporary disability leave of absence.

6. It was later reported by Dr. Schwab, as noted in his June 10, 1992 letter, that the Claimant reported hip pain, in the area of the sacroiliac joint area.

Contested facts:

Claimant's statement that he had low back pain shortly after the injury is credited. I also credit that he did report that low back pain to Dr. Schwab on his second visit on June 10, 1992, even though he did not report it when Dr. Schwab treated his more immediate and painful, finger and knee injuries on that initial visit. Claimant also reported it to Dr. Dickenson on July 13, 1992,

as set forth in the August 6, 1992 report; and that the back pain manifested itself within the next day or two after the Claimant's injury.

Besides the Claimant's own consistency and demeanor in testifying to the presence of low back pain after the injury, other records verify the fact of the back pain, as of the time of, or shortly after the injury. These include: The questionnaire form of Claimant's attorney, Mr. Cohen, filled out by the Claimant on June 9, 1992; Claimant's claim for Longshore Benefit compensation, dated June 16, 1992 and state compensation benefits, which, by letters and forms submitted by Claimant's attorney, were mailed by June 16, 1992. (See, Ct. Ex. 26) In crediting Claimant's testimony that on June 10, 1992 he reported to Dr. Schwab that he had low back pain, Claimant was reporting "new" post-day-of-injury hip pain by Dr. Schwab's own deposition testimony, and this was interpreted by Dr. Schwab to be hip pain emanating from his sacroiliac joint area. In this prompt linking of the hip pain and injury to the previously injured area, it is my conclusion that Dr. Schwab either knew or should have known of the newly injured S1 area, as evidenced by documents in the records of the Employer, and that he deliberately hastened to attribute any new hip pain as being solely due to the 1988 injury, rather than from Claimant's new injury.

I credit Dr. Dickenson's and Dr. Brown's determination that the Claimant suffered a small disc herniation at the L5-S1 level as a result of Claimant's June 5, 1992 accident and injuries; that this resulted in an inability to lift or carry or pull weights in excess of, or with a resistance of, 50 lbs., and do any sort of repetitive, kneeling, squatting, or crawling , and sitting on hard surfaces for continuous time periods as part of his job duties, and that he could, therefore, no longer perform the heavy weight duties of the electrical snapper job being performed by him before the time of his injury on June 5, 1992. Claimant's low back injury resulted in a 5% disability of the whole person due as of the date of his maximum medical improvement as of the date of Dr. Dickenson's evaluation of November 23, 1992.

There is absolutely no credible evidence that the Claimant did not actually perform the heavy duties that he testified to as part of his electrical snapper duties for the six months before his injuries on June 5, 1992, and in fact for both the electrical snapper and marine electrician positions for the full year before his 1992 injury. I find that those duties consisted of not only reading prints, laying out work and exercising lower level supervisory duties as an electrical snapper, but that it included carrying heavy objects, and performing virtually all of the duties of marine electrician. These included lifting and carrying such items as his tool box weighing 60 - 65 lbs.; intercom materials such as, not only boxes that weighed 20 lbs. each, but combined boxes of two or three joined 20 lb. boxes, totaling 40 to 60 lbs., and cable pulling, with exertions occasionally ranging from 60 to 100 lbs. in

order to get his work done. He had to sit for long periods of time on hard surfaces on some jobs, with only limited ability to meaningfully change this and the following positions where he had to repetitively bend, kneel, twist and crawl on others, and stoop on still others. He had to do continuous bending, kneeling, stooping, stretching, reaching, and work underneath false flooring. Depending on the job, these positions could last for several hours, or even days, as he placed himself over, under, and around obstacles to perform his electrical snapper work.

It is my opinion that the employer accepted the type of follow-up that the Claimant would do to get a job done as electrical snapper, such as pulling cable to complete a missed circuit and using his more complete set of tools to do so on the spot, as part of these duties, regardless of what it may have accepted from others with the same rating or stated in its job description. It is also my conclusion that the "electrical snapper" position, as manifested in him, was regularly utilized with the expectation that the better electricians would do exactly what the Claimant was doing in the position. The Employer regularly, every payday, rewarded the Claimant for this work, at the electrical snapper level, and presented absolutely no evidence that it ever evaluated his work as being contrary to its expectations in this regard. For that reason, I also credit the job analysis of Dr. Metcalf over that of Dr. Remas, as being an apt, credible account of duties that electrical snapper, Mark Trefry, was performing on the job for Southwest Marine, in relation to the somewhat idyllic, electrical snapper duties that may or may not have been performed on an actual day-to-day basis by other employees with that rating. For Mr. Trefry's electrical snapper position, the job encompassed marine electrician work, interior communication work and work of a hook-up specialist. Those were his duties as electrical snapper, with all of the physical exertion requirements as set forth above. (The testimony of Foremen, Cindy Spell and John Pickett do not affect this result since they were seldom working with the Claimant, and the report of Mr. Remas does not even consider the work actually being performed by the Claimant. Since Dr. Metcalf did consider Claimant's actual work duties, and even accurately sub-classified the components of them in accordance with the Dictionary of Occupational Titles, I credit his report over that of Mr. Remas, and, therefore, give it more weight.)

In reviewing the two job analyses of Dr. Metcalf and Mr. Remas, I find the most glaring differences in the two to involve that of the lifting/carrying/pulling requirements described by Mr. Trefry, and accurately depicted in the Metcalf report, as opposed to those described by the Remas report, which did not reflect the weights actually lifted, carried and pulled by him. Both reflected sitting, standing, climbing, kneeling, squatting, crawling and bending. The Remas report actually added frequent reaching from various positions, and confirmed, under the title, "Awkward Positioning/ Posture," that "assignment can be in any area of ship and worker must access wires/ equipment which may be under counters, behind other materials in

tanks, etc." (Er. Ex. Y, p. 092) This verified Mr. Trefry's testimony. Dr. Metcalf uses the word "frequent" in relation to all of the various positions, while the Remas report limits those requirements primarily to, "occasionally." For reasons stated otherwise stated herein, I have credited the testimony of Claimant in this regard, the lifting restrictions on Dr. Brown to the effect that he is unable to continuously and repetitiously perform those functions, and the limitations imposed on vocational analyses by them of the Metcalf report, as part of the regular electrical snapper position. Therefore, it is my determination that based upon normal electrical snapper exertional requirements alone, without considering the lifting/ carrying pulling requirements of the position actually being performed by Mr. Trefry, he could not have possibly sustained continuous employment with these other frequent, continuous and repetitious requirements for "8 to 12 hours per day from 5 to 7 days per week." As a consequence of Claimant's work inquiries, he is no longer able to perform the essential exertional duties of his electrical snapper position and is permanently disabled therefrom, even with the general right to refuse overtime, and the breaks provided, as described by the Remas report. (Ct. Ex. Y, p. 089)

Claimant's residual work capacity has been adequately demonstrated in his retraining and copier service repair employment, which he has sustained since 1993. Therefore, his disability is considered partial.

Almost in spite of itself, and due primarily to the clarification of Dr. Brown set forth in his post hearing responses to interrogatories, I find that the Employer is entitled to Section 8(f) relief, as more particularly set forth, herein. For the reasons clearly explained by Dr. Brown, Claimant's pelvic fracture from the foraminal area to the S1 area is directly related to the significant aggravation to the S1 area by the June 2, 1992 injuries, and caused the small disc herniation at that location to become significantly symptomatic. While pain in the low back area was not mentioned to Dr. Schwab in the initial examination due to the extent of the immediate pain in the left ring finger and left knee, his knowledge of the extent of the prior pelvic fracture, at least by the second visit, should have triggered an inquiry about back pain, even if the Claimant did not mention it. However, I have credited the Claimant to the effect that he did either state that he had low back pain, or so indicated it by pointing to it; that there is some evidence of this in Dr. Schwab's acknowledging hip pain, and that he did nothing about the low back pain. Dr. Schwab did not then do what he should have done: directed a low back MRI scan, as was done by DR. Dickenson upon his examination in July. This would have revealed the small disc herniation, and have warranted further treatment in that area at an earlier time. Also, the relationship of the 1992 injury to that of the 1988 injury might have become manifest.

Conclusions of Law

Nature and Extent of Injury:

In arriving at a decision in this matter, the Administrative Law Judge, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459 (1968), *reh. denied*, 391 U.S. 929 (1969); Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962); Scott v. Tug Mate, Incorporated, 22 BRBS 164, 165, 167 (1989); Hite v. Dresser Guiberson Pumping, 22 BRBS 87, 91 (1989); Anderson v. Todd Shipyard Corp., 22 BRBS 20, 22 (1989); Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); Seaman v. Jacksonville Shipyard, Inc., 14 BRBS 148.9 (1981); Brandt v. Avondale Shipyards, Inc., 8 BRBS 698 (1978); Sargent v. Matson Terminal, Inc., 8 BRBS 564 (1978). At the outset it further must be recognized that all factual doubts must be resolved in favor of the claimant. Wheatley v. Adler, 407 F.2d 307 (D.C. Cir. 1968); Strachan Shipping Co. v. Shea, 406 F.2d 521 (5th Cir. 1969), cert. denied, 395 U.S. 921 (1970). Furthermore, it has been held consistently that the Act must be construed liberally in favor of the claimant. Voris v. Eikel, 346 U.S. 328 (1953); J.V. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). Based upon the humanitarian nature of the Act, claimants are to be accorded the benefit of all doubts. Durrah v. WMATA, 760 F.2d 320 (D.C. Cir. 1985); Champion v. S & M Traylor Brothers, 690 F.2d 285 (D.C. Cir. 1982); Harrison v. Potomac Electric Power Company, 8 BRBS 313 (1978).

The Act provides a presumption that a claim comes within the provisions of the Act. See 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." Swinton v. J. Frank Kelly, Inc., 554 F.2d 1075 (D.C. Cir. 1976), cert. denied, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. Golden v. Eller & Co., 8 BRBS 846 (1978), *aff'd*, 620 F.2d 71 (5th Cir. 1980); Anderson v. Todd Shipyards, supra, at 21; Miranda v. Excavation Construction, Inc., 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "*prima facie*" case. The Supreme Court has held that a "*prima facie*" claim for compensation, to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers'

Compensation Programs, U.S. Department of Labor, 455 U.S. 608, 102 S.Ct. 1318 (1982), rev'g Riley v. U.S. Industries/ Federal Sheet Metal, Inc., 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, i.e., harm to his body. Preziosi v. Controlled Industries, 22 BRBS 468, 470 (1989); Brown v. Pacific Dry Dock Industries, 22 BRBS 284, 285 (1989); Trask v. Lockheed Shipbuilding and Construction Company, 17 BRBS 56, 59 (1985); Kelaita v. Triple A. Machine Shop, 13 BRBS 326 (1981).

To establish a prima facie claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. Kelaita, supra; Kiel v. Bethlehem Steel Corp., 16 BRBS 128 (1984). Once this prima facie case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. Kier, supra; Parsons Corp. of California v. Director, OWCP, 619 F.2d 38 (9th Cir. 1980); Butler v. District Parking Management Co., 363 F.2d 682 (D.C. Cir. 1966); Ranks v. Bath Iron Works Corp., 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. Brown v. Pacific Dry Dock, 22 BRBS 284 (1989); Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. Del Vecchio v. Bowers, 296 U.S. 280 (1935); Volpe v. Northeast Marine Terminals, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue, resolving all doubts in claimant's favor. Sprague v. Director, OWCP, 688 F.2d 862 (1st Cir. 1982); MacDonald v. Trailer Marine Transport Corp., 18 BRBS 259 (1986).

In the present case, Claimant alleges that the harm to his body, *i.e.,* the effects of an injury to his hip and back, in addition to those affecting his left ring finger and left knee, already compensated, resulted from a twist and fall while working and climbing down a ladder on a vessel of the Employer. The Employer has introduced evidence challenging the existence of such harm to the Claimant's back, in relation to any injury from his maritime employment. I have determined that a low back injury has been established as more particularly set forth above. (In this regard, see Romeike v. Kaiser Shipyards, 22 BRBS 57 (1989). Thus, Claimant has established a *prima facie* claim that such harm is a work-related injury, as shall now be discussed.

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. *See* 33 U.S.C. §902(2); U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor, 455 U.S. 608, 102 S.Ct. 1312 (1982), rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc., 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. Gardner v. Bath Iron Works Corporation, 11 BRBS 556 (1979), *aff'd sub nom*. Gardner v. Director, OWCP, 640 F.2d 1385 (1st Cir. 1981); Preziosi v. Controlled Industries, 22 BRBS 468 (1989); Januszieiwicz v. Sun Shipbuilding and Dry Dock Company, 22 BRBS 376 (1989) (**Decision and Order on Remand**); Johnson v. Ingalls Shipbuilding, 22 BRBS 160 (1989); Madrid v. Coast Marine Construction, 22 BRBS 148 (1989).

Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. Strachan Shipping v. Nash, 782 F.2d 513 (5th Cir. 1986); Independent Stevedore Co. v. O'Leary, 357 F.2d 812 (9th Cir. 1966); Kooley v. Marine Industries Northwest, 22 BRBS 142 (1989); Mijangos v. Avondale Shipyards, Inc., 19 BRBS 15 (1986); Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046 (5th Cir. 1983); Mijangos, supra; Hicks v. Pacific Marine & Supply Co., 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. Lopez v. Southern Stevedores, 23 BRBS 295 (1990); Care v. WMATA, 21 BRBS 248 (1988).

In this case, the determination of low back injury due to Claimant’s June 5, 1992 accident is that it is now fully, permanently and partially compensable under the provisions of this act.

Nature and Extent of Disability:

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. Quick v. Martin, 397 F.2d 644 (D.C. Cir. 1968); Owens v. Traynor, 274 F. Supp. 770 (D.Md. 1967), aff'd, 396 F.2d 783 (4th Cir. 1968), cert. denied, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. Nardella v. Campbell Machine, Inc., 525 F.2d 46 (9th Cir. 1975). Consideration must be given to

claimant's age, education, industrial history and the availability of work he can perform after the injury. American Mutual Insurance Company of Boston v. Jones, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (Id. at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. Carroll v. Hanover Bridge Marina, 17 BRBS 176 (1985); Hunigman v. Sun Shipbuilding & Dry Dock Co., 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031 (5th Cir. 1981); Air America v. Director, 597 F.2d 773 (1st Cir. 1979); American Stevedores, Inc. v. Salzano, 538 F.2d 933 (2d Cir. 1976); Preziosi v. Controlled Industries, 22 BRBS 468, 471 (1989); Elliott v. C & P Telephone Co., 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, Shell v. Teledyne Movible Offshore, Inc., 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, Trans-State Dredging v. Benefits Review Board, 731 F.2d 199 (4th Cir. 1984), once suitable alternative employment is shown. Wilson v. Dravo Corporation, 22 BRBS 463, 466 (1989); Royce v. Elrich Construction Company, 17 BRBS 156 (1985).

Moreover, although a claimant relocates for personal reasons, employer can still meet its burden of establishing suitable alternate employment if it shows that such jobs are available within the geographical area in which claimant resided at the time of the injury. McCullough v. Marathon LeTourneau Company, 22 BRBS 359, 366 (1989); Dixon v. John J. McMullen and Associates, 19 BRBS 243 (1986); Elliott v. C & P Telephone Co., 16 BRBS 89 (1984).

On the basis of the totality of this closed record, I find and conclude that Claimant has established he cannot return to his former work as an electrical snapper. The burden thus rests upon the Employer to demonstrate the existence of suitable alternative employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. American Stevedores, Inc. v. Salzano, 538 F.2d 933 (2d Cir. 1976); Southern v. Farmers Export Company, 17 BRBS 64 (1985). In the case at bar, the Employer submitted no new evidence as to the availability of suitable alternative employment, See Pilkington v. Sun Shipbuilding and Dry Dock Company, 9 BRBS 473 (1978), aff'd on reconsideration after remand, 14 BRBS 119 (1981), and instead appeared to be relying solely on its definition of the electrical snapper position and the copier repair service job that the Claimant was retrained for, and had been performing since 1993. See also Bumble Bee Seafoods v.

Director, OWCP, 629 F.2d 1327 (9th Cir. 1980). Having established that he could perform some level of work for which jobs were, and continue to be available by his rehabilitation and retraining as a copy repair serviceman, the Claimant is not entitled to total disability, but to permanent partial disability under 33 U.S.C. § 908(c) of the Act.

An award for permanent partial disability in a claim not covered by the schedule is based on the difference between Claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. § 908(c)(21)(h); Richardson v. General Dynamics Corp., 23 BRBS (1990); Cook v. Seattle Stevedoring Co., 21 BRBS 4, 6 (1988). If a claimant cannot return to his usual employment as a result of his injury but secures other employment, the wages which the new job would have paid at the time of claimant's injury are compared to the wages claimant was actually earning pre-injury to determine if claimant has suffered a loss of wage-earning capacity. Cook, 21 BRBS at 6. Subsections 8(c)(21) and 8(h) require that wages earned post-injury be adjusted to the wage levels which the job paid at time of injury. See Walker v. Washington Metropolitan Area Transit Authority, 793 7.2d 319 (D.C. Cir. 1986); Bethard v. Sun-Shipbuilding & Dry Dock Co., 12 BRBS 691, 695 (1980).

In White v. Bath Iron Works Corp., 812 F.2d 33 (1st Cir. 1987), Senior Circuit Court Judge Bailey Aldrich framed the issue as follows: "the question is how much claimant should be reimbursed for this loss (of wage-earning capacity), it being common ground that it should be a fixed amount, not to vary from month to month to follow current discrepancies." White, 812 F.2d at 34. Senior Circuit Judge Aldrich rejected outright the employer's argument that the Administrative Law Judge "must compare an employee's post-injury actual earnings to the average weekly wage of the employee's time of injury" as that thesis is not sanctioned by section 8(h). Thus, the post-injury wages must first be adjusted for inflation and then compared to the employee's average weekly wage at the time of his/her injury.

One way in which an employer can meet its burden of showing suitable alternate employment is through vocational evidence which establishes the existence of specific and actual employment opportunities available to the injured employee. Bumble Bee Seafoods v. Director, OWCP, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). For the job opportunities to be realistic, Employer must establish their precise nature and terms, Reich v. Tracor Marine, Inc., 16 BRBS 272 (1984), and the pay scales for the alternate jobs. Moore v. Newport News Shipbuilding & Dry Dock Co., 7 BRBS 1024 (1978). While the Administrative Law Judge may rely on the testimony of a vocational counselor that specific job openings exist to establish the existence of suitable jobs, Southern v. Farmers Export Co., 17 BRBS 64 (1985), Employer's counsel must identify specific, available jobs; labor

market surveys are not enough. Kimmel v. Sun Shipbuilding & Dry Dock Co., 14 BRBS 412 (1981).

In the present case, no evidence was presented by the Employer that it had alternative available work within the work restrictions of Dr. Brown. Employer does claim in its brief that it made an offer to Mr. Trefry to return to work as an electrical snapper, and that he refused. I find that any offer to return to work made to Mr. Trefry was made with the expectation that he would work as he had in the past, and that this encompassed all of the work that Mr. Trefry testified to as having been performed by him. The Employer's submitted job description does not change my view on this matter. There is no evidence in this record that the Employer ever sought to clarify Mr. Trefry's own duties, or to insure that he would be performing work at the necessary exertional level.

Instead, utilizing the Remas report, and its incorporation of the Nimietz report's rehabilitation and retraining activity of Claimant in 1993 through his hire as a copy repair serviceman by Copyline, it simply recounts attempts to determine what other copy repair service suppliers are paying its repairmen to attempt to prove that he could have been paid more for the position that he obtained, had he worked in the same position for some other employer. Recognizing the inadequacy of its postion, the Employer states in its brief with regard to the Claimant's present hourly wage of $9.70 per hour, that it is, "an unreasonably low wage," that "is inexplicable given his employment as a copier repairman since 1993." He states that he, "has not lost any time due to his alleged disability and has not required special accommodation that would limit his employment opportunities," without even addressing or commenting on the testimony of the Claimant concerning the back pain that he does experience in his daily work for Copyline.

In criticizing Mr. Trefry's effort to seek further training at Copyline, and achieve higher pay there, while ignoring the true meaning of what it is saying about the consistency of his work ethic as a continuation of that exhibited in his former job at Southwest Marine, the Employer has the audacity to state: "This lack of a work ethic sharply contrasts with the claimant's work history as an electrical snapper and his efforts during vocational rehabilitation. At Southwest Marine, the Claimant actively sought to go beyond the minimum requirements of the job, stating, 'If you're good at what you do, they'll keep you.' The strong work ethic made him a valuable well paid employee. Likewise, the claimant received high scores and graduated at the top of his copier training class with the reputation of being a highly skilled technician." The Employer then attempts to link all of this to unsupported allegations of extreme alcohol abuse, concluding: "The Claimant's apparent failure to achieve as expected appears to be the product of his own choice, not the consequence of his disability." In other words, it is deliberate, in contrast to a long history of outstanding job performance! For reasons otherwise stated herein, I completely credit Mr. Trefry's

consistent truthful testimony presented at the hearing on the reasons for his change of employment. I also credit the continuation of his work ethic at Copyline, where he sought employment, and has remained employed, instead of trying to live off from the public trough.

Neither the Remas report, nor any other action on the part of the Employer has demonstrated an effort on its part to find or secure alternative employment within the limitations as set forth by Dr. Brown. Once again, with the restrictions imposed by the Employer on even finding out what Claimant actually did on his electrical snapper job, and comparing that with the limitations of Dr. Brown, I am unable to give much weight to the Remas report. In view of the foregoing, I cannot accept the results of the Labor Market Survey because, without the required information about each job, I am simply unable to determine whether or not any of those jobs constitutes, as a matter of fact or law, suitable alternative employment or realistic job opportunities. In this regard, see Armand v. American Marine Corp., 21 BRBS 305, 311, 312 (1988); Horton v. General Dynamics Corp., 20 BRBS 99 (1987).

Since the Employer was unable to confirm the availability of meaningful alternative employment, even to the copier repair serviceman position, I therefore find that the Claimant has established his wage earning capacity with the Copyline position, and that he is permanently and partially disabled from performing other employment, on the record in this matter.

Section 8(h) of the Act, 33 U.S.C. §908(h), provides that claimant's wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity. See Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039, 26 BRBS 30 (CRT)(5th Cir. 1992); Randall v. Comfort Control, Inc., 725 F.2d 791, 16 BRBS 56 (CRT)(D.C. Cir. 1984). In determining whether the employee's actual post-injury wages fairly and reasonably represent his/her wage-earning capacity, relevant considerations include the employee's physical condition, age, education, industrial history, and availability of employment which he/she can perform post-injury. Fleetwood v. Newport News Shipbuilding & Dry Dock Co., 776 F.2d 1225,18 BRBS 12 (CRT)(4th Cir. 1985), aff'g 16 BRBS 282 (1984); Randall, 725 F.2d at 791, 16 BRBS at 56 (CRT); Devillier v. National Steel & Shipbuilding Co., 10 BRBS 649, 660 (1979).

In this regard, I find that the Claimant's actual wage earning capacity is the wage that he is receiving at Copyline, $9.70 per hour, plus any additions that he has received since the date of the hearing, to be determined by the Director.

Medical Benefits:

An employer found liable for the payment of compensation is, pursuant to section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-

related injury. Perez v. Sea-Land Services, Inc., 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. Colburn v. General Dynamics Corp., 21 BRBS 219 (1988); Barbour v. Woodward & Lothrop, Inc., 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. Addison v. Ryan-Walsh Stevedoring Co., 22 BRBS 32, 36 (1989); Mayfield v. Atlantic Gulf Stevedores, 16 BRBS 228 (1984); Dean v. Marine Terminals Corp., 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to section 7(b), is well settled. Bulone v. Universal Terminal and Stevedore Corp., 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. Tough v. General Dynamics Corp., 22 BRBS 356 (1989); Gilliam v. The Western Union Telegraph Co., 8 BRBS 278 (1978).

To date, there appears to be no actual significant medical benefits to which the Claimant has established a monetary entitlement at this time. However, he may require future medical care, such as surgical intervention in the low back in the future, and therapy from time to time, on a symptomatic basis, as stated by Dr. Brown. He is clearly entitled to such benefits under 33 U.S.C § 907(b).

Section 8(f) of the Act:

Regarding the Section 8(f) issue, the essential elements of that provision are met, and employer's liability is limited to one hundred and four (104) weeks, if the record establishes that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the employer prior to the subsequent compensable injury and (3) which combined with the subsequent injury to produce or increase the employee's permanent total or partial disability, a disability greater than that resulting from the first injury alone. Lawson v. Suwanee Fruit and Steamship Co., 336 U.S. 198 (1949); FMC Corporation v. Director, OWCP, 886 F.2d 118523 BRBS 1 (CRT) (9th Cir. 1989); Director, OWCP v. Cargill, Inc., 709 F.2d 616 (9th Cir. 1983); Director, OWCP v. Newport News & Shipbuilding & Dry Dock Co., 676 F.2d 110 (4th Cir. 1982); Director, OWCP v. Sun Shipbuilding & Dry Dock Co., 600 F.2d 440 (3rd Cir. 1979); C & P Telephone v. Director, OWCP, 564 F.2d 503 (D.C. Cir. 1977); Equitable Equipment Co. v. Hardy, 558 F.2d 1192 (5th Cir. 1977); Shaw v. Todd Pacific Shipyards, 23 BRBS 96 (1989); Dugan v. Todd Shipyards, 22 BRBS 42 (1989); McDuffie v. Eller and Co., 10 BRBS 685 (1979); Reed v. Lockheed Shipbuilding & Construction Co., 8 BRBS 399 (1978); Nobles v. Children's Hospital, 8 BRBS 13 (1978). The provisions of Section 8(f) are to be liberally construed. See, Director v. Todd Shipyard Corporation, 625 F.2d 317 (9th Cir. 1980). The benefit of Section 8(f) is not denied an employer simply because the new injury merely aggravates an existing disability rather than creating a separate disability unrelated to the existing disability. Director, OWCP v. General Dynamics Corp., 705 F.2d 562, 15 BRBS 30 (CRT) (1st Cir.

1983); Kooley v. Marine Industries Northwest, 22 BRBS 142, 147 (1989); Benoit v. General Dynamics Corp., 6 BRBS 762 (1977).

The employer need not have actual knowledge of the pre-existing condition. Instead, "the key to the issue is the availability to the employer of knowledge of the pre-existing condition, not necessarily the employer's actual knowledge of it." Dillingham Corp. v. Massey, 505 F.2d 1126, 1228 (9th Cir. 1974). Evidence of access to or the existence of medical records suffices to establish the employer was aware of the pre-existing condition. Director v. Universal Terminal & Stevedoring Corp., 575 F.2d 452 (3d Cir. 1978); Berkstresser v. Washington Metropolitan Area Transit Authority, 22 BRBS 280 (1989), rev'd and remanded on other grounds sub nom. Director v. Berstresser, 921 F.2d 306 (D.C. Cir. 1990); Reiche v. Tracor Marine, Inc., 16 BRBS 272, 276 (1984); Harris v. Lambert's Point Docks, Inc., 15 BRBS 33 (1982), aff'd, 718 F.2d 644 (4th Cir. 1983). Delinski v. Brandt Airflex Corp., 9 BRBS 206 (1978). Moreover, there must be information available which alerts the employer to the existence of a medical condition. Eymard & Sons Shipyard v. Smith, 862 F.2d 1220, 22 BRBS 11 (CRT) (5th Cir. 1989); Armstrong v. General Dynamics Corp., 22 BRBS 276 (1989); Berkstresser, supra, at 283; Villasenor v. Marine Maintenance Industries, 17 BRBS 99, 103 (1985); Hitt v. Newport News Shipbuilding and Dry Dock Co., 16 BRBS 353 (1984); Musgrove v. William E. Campbell Company, 14 BRBS 762 (1982). A disability will be found to be manifest if it is "objectively determinable" from medical records kept by a hospital or treating physician. Falcone v. General Dynamics Corp., 16 BRBS 202, 203 (1984). Prior to the compensable second injury, there must be a medically cognizable physical ailment. Dugan v. Todd Shipyards, 22 BRBS 42 (1989); Brogden v. Newport News Shipbuilding and Dry Dock Company, 16 BRBS 259 (1984); Falcone, supra. Such information was readily available, and, indeed, was presented in the present matter without objection. (See, RX 7-8 & 11-17)

The pre-existing permanent partial disability need not be economically disabling. Director, OWCP v. Campbell Industries, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), cert. denied, 459 U.S. 1104 (1983); Equitable Equipment Company v. Hardy, 558 F.2d 1192, 6 BRBS 666 (5th Cir. 1977); Atlantic & Gulf Stevedores v. Director, OWCP, 542 F.2D 602 (3d Cir. 1976). For instance, an x-ray showing pleural thickening, followed by continued exposure to the injurious stimuli, establishes a pre-existing permanent partial disability. Topping v. Newport News Shipbuilding, 16 BRBS 40 (1983); Musgrove v. William E. Campbell Co., 14 BRBS 762 (1982). So, too, would the x-rays of sacrum.

Section 8(f) relief is not applicable where the permanent disability is due solely to the second injury. In this regard, see Director, OWCP (Bergeron) v. General Dynamics Corp., 982 F.2d 790, 26 BRBS 139 (CRT)(2d Cir. 1992); Luccitelli v. General Dynamics Corp., 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992); CNA Insurance Company v. Legrow, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991)

In addressing the contribution element of Section 8(f), the United States Court of Appeals for the Second Circuit, has specifically stated that the employer's burden of establishing that a claimant's subsequent injury alone would not have cause claimant's permanent total disability is not satisfied merely by showing that the pre-existing condition made the disability worse than it would have been with only the subsequent injury. See Director, OWCP v. General Dynamics Corp. (Bergeron), supra.

On the basis of the totality of the record, I find and conclude that the Employer has satisfied these requirements in the present case. The record reflects: (1) that Claimant has worked for the Employer since 1988; (2) that he slipped and fell while descending a ladder on the Employer's vessel; (3) that he had an x-ray in 1992 that revealed a small herniation of the L5-S1 disc, that resulted in a permanently and partially disabling condition, from which he suffered work restrictions, and finally, (4) that he ceased work due to a termination of his employment in December, 1992, while still able to perform duties with a lower level of exertion, with certain restrictions. (i.e., He had difficulty engaging in continuous and repetitive duties such as lifting or pulling weights over 50 lbs., kneeling, squatting, crawling, and sitting on hard surfaces.

The two examining physicians agree on the fact of Claimant's accident and resultant injuries to his ring finger and left knee, but disagree on whether there was an injury to the Claimant's low back. As stated above, Dr. Brown agrees with the assessment of Claimant's initial treating physician, Dr. Dickenson (deceased), that Claimant has a 5% disability to the whole man, effective November 23, 1992. In this regard, I credit Dr. Brown's affirmance of Dr. Dickenson's assessment as Claimant's primary treating physicians in this diagnosis and give it the most weight in drawing my ultimate conclusions at this point in the evaluation of the Claimant's disability. I give less weight to the initial treating physician, Dr. Schwab, who performed services for the Medical Center of the Employer, for the reasons set forth above in the findings of fact.

Therefore, I find that Claimant has a permanent partial disability rating of 5% based upon his low back condition, which I find is, at least in part, attributable to the injuries sustained on the Employer's vessel in its shipyard while working there. The Claimant is entitled to permanent partial disability benefits under the Act from Dr. Dickenson's November 30, 1992 report. Therefore, I also find, as a basis for this determination, that the Claimant's date of maximum medical improvement is November 23, 1992, the date of Dr. Brown's examination.

The Board has consistently held that, except in hearing loss cases, Section 8(f) only applies to schedule injuries exceeding 104 weeks. Byrd v. Toledo Overseas Terminal, 18 BRBS 144, 147 (1986); Strachan Shipping Co. v. Nash, 15 BRBS 386, 391 (1983), aff'd in

relevant part, 760 F.2d 569 (5th Cir. 1985), and on reconsideration en banc, 782 F.2d 513 (5th Cir. 1986).

Section 8(f) relief is not available to the employer simply because it is the responsible employer or carrier under the last employer rule promulgated in Travelers Insurance Co. v. Cardillo, 225 F.2d 137 (2d Cir. 1955), cert. denied sub nom. Ira S. Bushey Co. v. Cardillo, 350 U.S. 913 (1955). The three-fold requirements of Section 8(f) must still be met. Stokes v. Jacksonville Shipyards, Inc., 18 BRBS 237, 239 (1986), aff'd sub nom. Jacksonville Shipyards, Inc. v. Director, 851 F.2d 1314, 21 BRBS 150 (CRT) (11th Cir. 1988).

The last sentence of Section 8(f) of the Act clearly applies to the present matter. It states:

> In all other cases in which the employee has a permanent partial disability, found not to be due solely to that injury, and such disability is materially and substantially greater than that which would have resulted from the subsequent injury alone, the employer shall provide in addition to the compensation under paragraphs (b) and (e) of this section, compensation for 104 weeks only. (Emphasis added.)

In this case, the disability resulting from the June 5, 1992 work injury, is "materially and substantially greater than that which would have resulted from the 1988 injury alone. The second, was of a lesser degree or effect than the first, and insufficient, by itself, to cause relinquishment of his job as an electrical snapper. He was able to work as an electrical snapper with the 0% impairment resulting from the first. It must also be assumed, therefore, that he would not have been "disabled" from performing that same electrical snapper position if the 5% low back disability had resulted solely from the June 5, 1992 injury, in the absence of the first.

Since all named physicians have concluded that, if there is a finding of permanent partial disability from his low back injury, the Claimant's current permanent partial disability was at least in part the result of a prior injury, it is my conclusion that the Employer is responsible for 104 weeks of payment.

In light of the fact that the Claimant never returned to work at the Employer's shipyard after the December, 1992 termination, and all of the assignments of disability ratings are phrased in terms of the permanent effects of his low back injury or lack thereof, and that there is absence of any other contrary statement by any of the physicians, I find that the date of the maximum medical improvement of the Claimant is November 23, 1992, the date of Dr. Dickenson's examination assigning the 5% disability, and that Claimant's

entitlement to permanent partial disability benefits should run for 104 weeks from that date.

The documents demonstrate that the Employer has paid the Claimant $18,029.68 in temporary total benefits from June 5, 1992 through March 28, 1993 at the rate of $429.28 per week for 42 weeks, but no permanent partial benefits which would now constitute a set-off against any benefits that are due and owing to the Claimant. As set forth in the stipulations, he is entitled to partial disability benefit payment of $429.28 per week, for a period of 104 weeks beginning on November 23, 1992. Thereafter, the Employer is entitled to Section 8(f) relief, consisting of the payment of such benefits to the Claimant from the Special Fund, until further order.

Medical Benefits:

Under the provisions of 33 U.S.C. § 907(a), the Act obligates the payment of medical expenses for such period as the nature of the injury or the process of recovery may require. See, *e.g.,* **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). Claimant is entitled to the reimbursement of medical benefits reasonably and necessarily incurred as a result of his work related injury in this case.

The Responsible Employer:

Southwest Marine, Inc., was the employer with whom Claimant had his most recent period of cumulative shipyard employment, and, therefore the properly designated responsible employer, herein.

Attorney's Fees:

No award of attorney's fees for services to Mr. Trefry is made herein, since no application has been received from counsel. A period of 30 days is hereby allowed for counsel to submit an application, with a service sheet showing that service has been made upon all parties, including Claimant, Mr. Trefry. The Parties have 10 days following receipt of any such application within which to file their objections. The Act prohibits the charging of any fee in the absence of such approval. *See,* §§ 725.365 and 725.366.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director. Therefore,

It is therefore ORDERED that:

1. Commencing on June 6, 1992 and continuing through the date of Claimant's maximum medical improvement on November 23, 1992, the Employer shall pay the Claimant temporary total disability benefit payments in the amount of $429.28 per week.

2. Commencing on November 24, 1992 and continuing through the period of his rehabilitation and retraining from March 28, 1993 to November 22, 1993, the Employer shall pay permanent total disability payments in the amount of $429.28.

3. Commencing on November 24, 1993, the Employer shall pay to the Claimant compensation benefits for his permanent partial disability based upon the difference between his average weekly wage at the time of the injury, $643.92, and his 5% loss of wage-earning capacity after the injury, which has resulted in a loss of earning capacity of $214.54 a week. This results in a compensation rate under Section 8(c)(23) of the Act of two thirds that amount, or $145.02 per week, plus the applicable annual adjustments provided in Section 10 of the Act.

4. The Employer's liability for permanent total and/or permanent partial disability benefit payments shall be 104 weeks commencing on November 24, 1992.

5. After the cessation of payments by the Employer, continuing benefits shall be paid, pursuant to Section 8(f) of the Act, from the Special Fund established in Section 44 of the Act until further Order.

6. State compensation benefit payments may be deducted from the amount paid to the Claimant upon proper showing to the District Director.

7. The Employer shall also receive a set-off and/or a refund, with appropriate interest, of all payments and/or overpayments of compensation made to Claimant herein, if any.

8. The Employer shall reimburse such reasonable, appropriate and necessary medical care and treatment expenses as the Claimant's work-related injury referenced herein may require, subject to the provisions of Section 7 of the Act.

9. Upon application, the Employer shall pay the Claimant's attorneys fees and costs as set forth therein, subject to .

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THOMAS F. PHALEN, JR.
Administrative Law Judge